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PENSION AND PROFIT SHARING PLANS
Herman E. Taylor

SEARCH AND SEIZURE IN MISSISSIPPI
Henry L. Rodgers

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Mississippi Law Journal

VOLUME XXVIII DECEMBER, 1956 NUMBER 1

PENSION AND PROFIT SHARING PLANS

*Herman E. Taylor**

I. THE LAWYER'S FUNCTION IN PENSION PLANNING

Only the attorney, who represents the interests of a particular business, is suited by training or motivation to the giving of advice upon which the final decision of management should be based in adopting a pension or profit sharing plan.

The attorney, confronted with the task of recommending and preparing a pension plan or a profit sharing plan for a favorite business client, cannot afford to be relegated to "rubber stamping" a "first draft" prepared by an actuarial firm, insurance company, or bank. He must be in a position to actively evaluate the contents of any such proposed plan, or to prepare his own first draft. He must be able to do this in the light of a comprehensive knowledge of the types of plans available, their costs and benefits, and the legal limitations within which such plans may operate, if he is to do justice to his client and to his profession.

The adoption of a pension plan or a profit sharing plan may well be a major step in the history of a business. Certainly it is one of the most lasting. The direct personal welfare of many employees, and perhaps the owners, and their families will be measured by the wisdom that is exercised in adopting a proper plan.

The terms of some of the applicable statutes have been quite enough to discourage one from further inquiry into the subject of employee benefit plans. One of the most important provisions of the statute formerly applicable to pension and profit sharing plans (section 23 (p) (1) of the Internal Revenue Code of 1939) read in part as follows:

> "(1) General Rule.—If contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan, or if compensation is paid or accrued on account of any employees under a plan deferring the receipt of such compensation, such distributions or compensation shall not be deductible under subsection (a) but shall be deductible, if deductible under sub-

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> section (a) without regard to this subsection, under this subsection but only to the following extent."

This "subsection", happily, has been "clarified" and attorneys need no longer terminate their interest in the subject, or in tax law generally, with a reading of the above. Section 404 (a) of the Internal Revenue Code changes the last few lines to read as follows:

> ". . . such contributions or compensation shall not be deductible under section 162 (relating to trade or business expenses) or section 212 (relating to expenses for the production of income) but if they satisfy the conditions of either of such sections, they shall be deductible under this section, subject, however, to the following limitations as to the amounts deductible in any year."

However interesting it might be, this article is not so much concerned with the refinements of statutory construction, or the implications of decided cases, as with providing a usable and practical guide to the more important considerations in selecting and designing an employee benefit plan by the average lawyer for an average business client. It thus necessarily reflects some of the views and opinions of the writer, drawn in part from his experience with other lawyers, trust officers, insurance representatives and actuaries in the development and establishment of such plans.

The principal considerations involved in adopting a pension or profit sharing plan are legal considerations. They may range from obscure interpretations of the meticulously worded sections of the tax laws to questions of insurance law, trust law, labor law, corporation law, property law and blue sky laws of the various states. Regulations under wage and hour laws and those of the Securities and Exchange Commission, as well as those prescribing actuarial procedures will require study and application. Problems of business organization, of limitations upon trust activities and investments, of drafting plans and trusts and determining the rights of many parties require professional skill of the highest order.

There is a strong similarity between pension planning and estate planning. Pension planning is, in a sense, estate planning on a mass scale. Like estate planning, the mere size of the funds involved, or created, under pension and profit sharing plans appears to increase the tendency for other professions and even businesses to encroach upon the prerogatives of the legal profession. This trend increases the need for lawyers to be alert and informed in order to protect the interests of their clients from the pitfalls of erroneous, incomplete or biased advice and information.

It is extremely difficult, even for those who regularly work in this specialized area of tax law, to distinguish the subtle and technical sales arguments put forth in urging the adoption of one type of plan over another from well-informed and unbiased advice that is given for the sole good of the business and its employees.

Unfortunately, competition and/or limited knowledge sometimes causes decided differences of opinion, even among "experts" in this field. Each may be able to present convincing arguments favoring the plan in which he is most interested. Seeming confusion and conflict among these experts is compounded when presented to the average business executive with little, if any, knowledge of the technical aspects of these plans. Most, if not all, of these arguments have a basis in law and apparent dilemmas may disappear when a capable attorney is consulted.

It is for the attorney alone to assemble the information required in the development of a sound pension and profit sharing plan for the business he represents. It is for him to guide the executive through the maze of legal considerations necessary to the selection of a suitable type of plan and its proper design. It is his function to draft and implement the plan, to obtain approval of its terms by the Treasury Department, and to assist in establishing the trust that is a part of the plan. This should be followed by supervision, day to day and year by year, of the administration of the plan and the resolution of the countless problems that will arise in such activity. It will probably become his duty to determine the rights of beneficiaries under the plan. If this work is well done, his rewards should be sufficient and lasting.

II. DO MANY BUSINESSES ACTUALLY ADOPT PENSION AND PROFIT SHARING PLANS?

Yes. The Treasury Department has reported that $2,551,840,000.00 were claimed as deductions from taxable income of corporations in fiscal year 1952 for contributions made to "qualified" pension and profit sharing plans. The amounts of such deductions have steadily grown. In 1946 the figure was $835,000,000.00. In 1948 it was $1,114,347,000.00 and in 1950 it was $1,660,915,000.00.

The Treasury Department has reported that 4,395 Plans were approved during the year ending on June 30, 1954. This brought the total number of "qualified" plans to 24,879.

III. WHAT ARE PENSION AND PROFIT SHARING PLANS?

Pension and profit sharing plans are two of the types of employee benefit plans providing for "deferred compensation" of employees, as set forth in section 401 of the Internal Revenue Code of 1954.

The other principal types are the stock bonus plan and the annuity plan. The stock bonus plan is subject to most of the same provisions of the profit sharing plan, and the annuity plan is very similar to the pension plan, therefore, unless otherwise mentioned they may be considered as the same for purposes of this article. The terms "plan" and "trust" may usually be considered as meaning the same thing unless a contrary in-

tention appears. Frequently the plan is embodied in the trust instrument. Sometimes two separate instruments are used.

Perhaps the Internal Revenue Code (sections 401, 402, 403, and 404) tells as much about the plans as may be desired.

An employer is permitted, under section 401 (a) to establish a "qualified" trust as part of a stock bonus, pension or profit sharing plan "for the exclusive benefit of its employees or their beneficiaries" if the requirements of that section are met as to contributions, impossibility of diversion of funds, and coverage of employees, and if the plan does not discriminate in favor of certain highly placed employees.

The employer may then make contributions to the trust fund (or toward the purchase of annuity contracts if it is an annuity plan) and take deductions from taxable income in amounts described in section 404 for such contributions.

The trust is exempt from taxation on its income under section 501.

The employees, who are the beneficiaries of the trust (or annuity plan) are not taxed currently on the contributions that are made for their benefit. They will be taxed when the funds are distributed to them in later years at very favorable rates as provided under sections 402 and 403. Their beneficiaries will also enjoy certain income and estate tax exemptions under sections 101 (b) and 2039 (c).

This is one of the few instances under the Internal Revenue Code where a company is allowed a deduction currently from taxable income for a future and contingent liability, for the employees have no presently vested right.

This arrangement, in effect, permits an employer to build a fund largely from current tax savings (up to 52% or more initially if the employer is a corporation), and to accumulate the income from such fund on a tax free basis until such time as amounts are distributable to the employees of the company under certain terms fixed by the company. The actual costs of paying pensions or other "fringe" benefits to employees is greatly reduced by the use of a "qualified" plan.

IV. HOW DOES A PENSION PLAN DIFFER FROM A PROFIT SHARING PLAN?

The most important difference is probably in the benefit provided.

A pension plan usually provides a "definitely determinable benefit" for employees at retirement.[1] This is usually a percentage of their final or average salary payable in installments during their lifetime after retirement. Retirement is usually authorized or required at age 65, but it may be earlier or later. Because the employee is promised a certain amount at a specific time, if he meets the conditions imposed, the em-

[1]Regulations 1.401-1 (a).

ployer must make contributions to the plan to provide the promised benefits. If employees are given credit for all prior service to the company it is necessary for the employer to pay to the trust sufficient sums to provide the benefits attributable to that prior service. This is usually called "past service credit". In addition he must provide, between the date of the adoption of the plan and the retirement date of each employee, sufficient sums to pay for the "normal costs" of the plan. He may pay for the "past service" liability in a single sum, in ten or more annual installments or in a level annual payment over the remaining future service of the employee.[2] He must pay interest on any portion of the past service costs that have not been paid. He may pay large amounts in some years and little or nothing in other years, but usually he must pay for past service eventually. The writer has observed that under many such pension plans the annual payments will range from five per-cent to nine per-cent of the payroll of the covered employees in installments over a period of twenty years or more, depending upon the liberality of benefits provided and the age of the employees and other factors.

A profit sharing plan provides no "definitely determinable benefit" for an employee.[3] The employer merely agrees to share with employees who meet certain requirements for eligibility and who serve for certain periods of time, a percentage of profits of the business, if and when made. The funds thus accumulated are invested for the benefit of eligible employees and at retirement or some other event, such as earlier death or disability, or after the expiration of a certain period of time, the amounts in the account of each employee in the trust may be paid out to the employee, or used for his benefit in accordance with the plan.

Under the pension plan the company must assume an obligation to pay a definite sum to the trust over a period of years. Under the profit sharing plan the company makes a commitment to pay a percentage of profits instead. The applicable regulations require a definite formula for sharing the profits and for determining the profits to be shared; however certain decisions of the courts have greatly decreased the importance of these provisions, and it is possible to obtain some flexibility in the formula, or to amend the formula from time to time.[4] Nevertheless there is a commitment by the company, and it is entirely possible that the company will eventually pay more under a profit sharing plan than under a pension plan. Perhaps the principal attractiveness of the profit sharing plan is that it would never cause hardship by way of requiring a contribution when there are no profits.

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[2]§§ 404 (a) (1) (A), (B), and (C).
[3]§ 404 (a) (3) (A).
[4]Regulations 1.401; McClintock-Trunkey Co. v. CIR, 217 F.2d 329 (9th Cir. 1954).

V. WHAT KIND OF BUSINESS CAN ADOPT ONE OF THESE PLANS?

Any kind of business may establish a "qualified" pension or profit sharing plan.

The advantages are greatest where adopted by a corporation. In a corporation the owners, as stockholders, may also be "employees" and thus benefit under the plan. This is not true of a proprietorship or a partnership since the owners are not considered employees.[5]

A pension or profit sharing plan may be adopted by a business of any size. The purpose that a company may have in adopting such a plan may vary greatly in accordance with its size, as well as with its financial status, form of business organization, and arrangement of stockholder interests. In larger companies the plans are usually adopted to effect some increased incentive or security and tax savings for employees. This may, or may not, be at the instance of organized labor or other employees of the company. In smaller companies, and in more closely held companies, the predominant reasons are likely to be tax advantages at the corporate and individual levels. A plan may constitute a valuable estate planning tool for the principal stockholders who are also employees.

Plans may be designed to accomplish many different purposes in the field of employee relations. Following are three examples:

(1) A profit sharing plan was used as the means for the settlement of the recent controversy in the automotive industry over the guaranteed annual wage demanded by the labor unions and effecting many thousands of employees. Distributions from an employee's account under a profit sharing plan will be made during lay-off periods to provide continued income during such periods.

(2) A profit sharing plan for a corporation with a single employee who was also the sole stockholder of the corporation was approved for "qualification" by the Treasury Department in Revenue Ruling 55-81. The reasoning was that the corporation might acquire at a later date additional employees who would be included in the plan. Thus, the benefits of these plans are available to the smallest as well as to the largest of businesses. One plan may cover all of the employees of a far-flung corporate empire. Another may cover the owner of the corner grocery store.

(3) In some instances it has been considered worthwhile to even change professional status and form of business organization in order to obtain the many tax advantages and other benefits available under a pension or profit sharing plan. This may take the form of a simple incorporation of an existing business, or one of its activities. In other cases very elaborate schemes may be developed.

[5]Part 2 (b) (1) Revenue Ruling 33, 1953.

In Montana in 1948, a group of doctors operating as a partnership decided to make such a change in their organization. They gave up the private practice of medicine, as partners, in order to become "employees" of an "association" by the same name and with the same employees and in the same location as the former partnership. The association was claimed to be taxable as a corporation under the federal income tax laws. It was then claimed that the association, since taxable as a corporation, was entitled to a tax deduction for contributions that it made to a pension plan for its employees, including former partners. The latter claim was in direct contravention to a long standing policy of the Commissioner of Internal Revenue that a former partner cannot be considered an "employee" for the purpose of awarding service credits for service rendered to the partnership before the creation of the successor corporation.[6] The association was clearly recognized as a partnership under state law.

Despite the opposition of the Commissioner, the doctors' scheme for funding their own retirement programs, largely from tax savings, with credit for prior service to the partnership, was upheld in a suit for refund of a deficiency assessed against one Dr. Arthur Kintner in *A. R. Kintner v. U.S.*[7] This was affirmed in *Arthur R. Kintner.*[8]

The Commissioner of Internal Revenue refused to acquiesce in the above decision and published Revenue Ruling 56-23 (1956) in which it was announced as a policy that the position of the court would not be accepted as a precedent in other cases with similar fact situations. Until a possible decision by the Supreme Court resolves the issue, any similar arrangement in other circuits will almost certainly be involved in litigation. The government did not ask the Supreme Court to review this particular case. A change in policy by the Commissioner to one of acquiesence would make pension and profit sharing plans a reality for professional and self-employed groups and individuals on a broad scale.

Legislation now pending in Congress, the Jenkins-Keogh Bill (HR 9 and 10), proposes extension of the principal benefits of pension plans to such groups. It seems possible that the Commissioner's position may be, in part, to await the outcome of this proposed legislation.

The very liberal views of the court in the *Kintner* case reflect the somewhat favorable attitude of courts and legislatures in matters pertaining to employee benefit plans in general.

VI. WHAT CAN A BUSINESS ACCOMPLISH BY ADOPTION OF A PENSION OR PROFIT SHARING PLAN?

Each type of "qualified" plan, including the stock bonus plan, has several advantages and objectives. Some of these may be attained under

[6]Supra note 5.
[7]107 Fed. Supp. 976 (D. Mont. 1952).
[8]216 F.2d 418 (9th Cir. 1954).

one of the other plans. Both types of plans may be adopted by a company for their respective advantages. For example: A pension plan might be adopted to provide a certain minimum sum to supplement other retirement income expected by employees. At the same time a profit sharing plan might be adopted to cover the same employees, or other employees, to provide a means of increasing incentive.

In general the following may be accomplished under the respective plans:

The pension plan may be used to:

supplement social security benefits with definite additional income for employees after retirement;

meet the demands of organized labor for increased security and "fringe" benefits for employees;

maintain a competitive position in the labor market in attracting desirable employees and retaining them by providing increasing retirement benefits with long service and salary advances;

facilitate tax savings and estate planning of highly paid employees (including stockholder-employees).

The profit sharing plan may be used to:

supplement Social Security benefits at retirement of empolyees as much as possible without the assumption of any fixed liability other than the sharing of profits, if and when made;

increase the incentive toward productiveness of employees;

anticipate the demands of organized labor for a pension plan, or other "fringe" benefits and to provide them as best suits the company without assuming any fixed liability such as might be imposed in negotiations with a union;

reward employees (including stockholder-employees) for long service by giving them the forfeited interests of employees who leave before obtaining vested rights to amounts contributed to the fund for their benefit;

create a fund, largely from tax savings, which while primarily for the benefit of employees, could be loaned to or invested in the company subject to certain limitations;

obtain most of the advantages inherent in a stock bonus plan by incorporation of provisions for the purchase of stock of the company with funds of the profit sharing plan. This may enable employees to purchase an interest in the business and perpetuate the services of the employees in the management and operation of the business at the retirement or death of the owner. It may provide a ready market for the stock of a closely held corporation in order to insure cash for death taxes. It may help preserve control and profits of the business for the beneficiaries of the owner. This may have an extremely important effect upon the valuation of the stock of the company for estate tax purposes.

Both Pension and Profit Sharing Plans are used to:

gain for the company and for its employees the many important tax advantages made available by a "deferred compensation plan" that is "qualified" and funded with a tax free trust, or the purchase of annuity contracts.

VII. WHAT ARE THE TAX ADVANTAGES?

The Internal Revenue Code of 1954 provides for:

Exemption from corporate income taxes (usually 25 to 52% or higher) for amounts contributed to a "qualified" pension, profit sharing or stock bonus plan (or annuity plan). This may actually reduce the rate of taxes paid by the company in addition to providing a deduction from taxable income. The authority is sections 404 (a) (1), (2) and (3).

Exemption from current individual income taxes (20% to 87%) to each employee for amounts contributed to the trust, or paid under an annuity plan, for his benefit. Such amounts would otherwise be taxable to the employee as additional current compensation. (sections 402 and 403).

Exemption from all federal income taxes (usually 20% or more) of the earnings of the trust fund established under the plan. (section 501 (a)).

Reduced income tax rates (not to exceed 25%) to employees and their beneficiaries on lump sum distributions in the year of separation from the service of the company or death of the employee after retirement. Sections 402 and 403 provide for taxation of such amounts as long term capital gains.

Deferment of taxation on the appreciation in value of stock or securities of the employer-company that are distributed to the employee, until the later sale or other disposition of such property. (section 402 (a) (2)).

Exemption from income tax on a portion of amounts received by a retired employee after age 65 . (section 37 (e)).

Exemption from federal estate taxes of the employee's share of the trust fund payable to beneficiaries, other than the executor, at the death of the employee. (section 2039 (c)). NOTE: Under state inheritance tax laws the benefits received under such plans are sometimes held taxable as transfers intended to take effect in possession or enjoyment at or after death.[9]

VIII. HOW MUCH DOES A COMPANY CONTRIBUTE TO A PENSION OR PROFIT SHARING PLAN?

Under a profit sharing plan or a stock bonus plan the employer may contribute any percentage of profits desired up to 15% of payroll of the employees who are beneficiaries under the plan. This percentage is determined by a formula which the company may desire to adopt. One such

[9] In re Brackett's Estate, 342 Mich. 195, 69 N.W.2d 164 (1955).

formula is 10% of profits before federal income taxes and after reservation of 6% of such profits for dividends on perferred stock but not more than 15% of payroll of the employees covered by the plan. The company could put any larger percentage of profits in that it might desire to insure that the maximum contribution is made each year. If profits are relatively stable, or if the formula is so designed, a profitable company may nearly always make the maximum contribution. There is a provision for carry-over of unused contributions and deductions contained in section 404 (a) (3) (A) and 404 (d).

Under a pension plan the allowable contribution may be determined under sections 404 (a) (1) (A) and (B) or under (C).

Exact computations of such amounts require the services of an actuary who must certify that the amounts are required to provide the benefits under the plan based upon salary, length of service, and life expectancy, as well as anticipated interest rates and a variety of other speculative factors. A "Bulletin on Section 23 (p) (1) of the Internal Revenue Code of 1939" was published on June 1, 1945, by the Treasury Department to explain many of the allowable assumptions and actuarial procedures considered acceptable. It may be found very useful in estimating costs and in verifying computations of the actuary.

The provisions of section 404(a)(1)(b) provide a method of funding of retirement benefits that may be of particular significance in providing for older employees who are near retirement age at the adoption of a pension plan. It authorizes the funding of pensions for such employees over a short remaining period of service. For the aging employee with a substantial estate, this provision may offer important estate tax saving possibilities. All amounts that could be paid into a pension plan for his benefit would pass at his death to his beneficiaries, other than to his executor, completely exempt from federal estate taxes under 2039 (c). Situations may be encountered where this would be very worthwhile, particularly in a closely held corporation with few employees other than the wealthy stockholder. In weighing the advisability of trying to take advantage of this opportunity the vital question is the amount that the stockholder-employee will give up in his capacity as a stockholder for the benefit of all of the covered employees in return for what he will receive as a retirement or death benefit in his capacity as one of the employees covered by the plan.

One type of pension plan that is so unlike the usual type as to deserve special mention is the so-called "Money Purchase Pension Plan." It has some resemblance to both a pension plan and a profit sharing plan. Under this type of plan the employer simply agrees to contribute a certain percentage of compensation of each employee to a trust for the benefit of the employees, regardless of the existence or non-existence of profits.

This percentage usually ranges from about five per-cent to nine per-cent. The employee gets whatever benefit that the funds accumulated from his account will provide at retirement. The funds are invested in the interim. At retirement they may be paid to the employee by the trustee or used to purchase an annuity contract for him.

Under the annuity plan, described in section 401 (b), the allowable contribution is whatever the insurance company charges for the premiums on the annuity contracts. These, of course include the same general cost elements as contributions to a pension plan, such as an amount for past and future service plus expense loading and profit factors of the insurance company, roughly equivalent to the charges made by trustees and actuaries under a trusteed pension plan.

The relative costs of "trusteed pension plans" and "insured pension plans" is one of the most controversial subjects in the entire field of pension planning between insurance representatives and actuaries and representatives of trust companies. The insurance company claims that it furnishes certain guarantees of payments that the actuary and trustee is unable to furnish. The latter parties usually claim that they can perform most other functions at considerably lower costs and with greater flexibility. Arguments on these points are frequently inconclusive.

IX. MUST ALL EMPLOYEES BE ALLOWED TO PARTICIPATE IN THE PLAN?

No. The plan may be limited to certain groups of employees such as clerical and office employees, or salaried employees, or those with more than five years service. Certain other classifications are permissible if not "discriminatory" in favor of "employees who are officers, shareholders, persons whose principal duties consist of supervising the work of other employees, or highly compensated employees."

If the plan is designed to cover all employees or all classes of employees other than part-time and seasonal workers and those with less than five years service, then certain percentage limitations are imposed by section 401 (a) (3) and (4) which require that at least 56 per-cent (80 per-cent of eligible employees if at least 70 per-cent are eligible) of the eligible employees be allowed to benefit under the plan. The same coverage requirements apply to pension, profit sharing and stock bonus plans, as well as annuity plans.

From the foregoing it is seen that a plan may actually cover only a few employees (salaried for example) out of hundreds on the company payroll. The ultimate test is whether the plan is discriminatory in favor of the prohibited classes. Revenue Ruling 33 of 1953 sets forth many of the practices that are, and that are not, considered discriminatory.

X. WHEN ARE BENEFITS PAYABLE?

Under pension plans the benefits are usually payable at the "normal retirement date", a term that is used in many plans to mean age 65. This results in the commencement of payments under the pension plan at the same time as under social security laws. Retirement benefits may be paid at any other predetermined event or date such as an "early retirement date," most frequently established as age 55, or on earlier death or disability. A reduced benefit that is the "actuarial equivalent" of the benefit that would have been payable at "normal retirement age" may be paid out upon such event. Under an annuity plan the amount would be the cash value at that time.

Under a profit sharing plan and stock bonus plan the benefits may be distributed at any time after accumulation for a "fixed number of years." This term is mentioned in code section 404 (a) (3) (A) and has been held to mean "at least 2 years" by Revenue Ruling 54231.

Thus, the advantages of deferred compensation may be obtained under a plan which distributes the benefits after holding the funds for only two years. In the event of the attainment of a stated age, or of illness, retirement, death or disability of an employee before the expiration of 2 years, it is permissible to provide for immediate and complete vesting of an employee's rights to the funds and total distributions to him or his beneficiaries of all amounts to his credit. In such event the requirement regarding accumulation for a fixed number of years is not applicable.[10]

Provisions are usually included in profit sharing plans for gradual vesting of the employee's rights in the fund at a small percentage each year. This prevents the employee from acquiring a right to a large sum of capital that he might obtain by leaving the service of the company before he has completed the desired minimum period of service. While the Treasury Department requires complete vesting by retirement age, it is permissible to vest the rights of the employee in his account very gradually (for example three per-cent to ten per-cent per year). Amounts that are not vested at the time an employee leaves the service of the company are forfeited.

XI. WHAT HAPPENS TO FORFEITED INTERESTS OF EMPLOYEES?

Under the pension plan the employee is promised a "definitely determinable benefit" at retirement. The forfeitures of other employees do not effect the amount of his expected benefit. They are applied to reduce the required contributions of the employer toward providing the promised benefit.

[10]Part 5 (1) Revenue Ruling 33, 1953; Revenue Ruling 54-231.

Under the profit sharing plan the situation is very different. Usually benefits vest gradually, but much earlier than under a pension plan. It is not unusual for a profit sharing plan to provide for complete vesting after only ten years of operation. Any amounts that have not vested when an employee leaves the service of the company are forfeited and are re-allocated to the account of the remaining employees. The usual method of re-allocation of forfeitures is to distribute them to the account of each remaining employee in accordance with the formula for sharing the annual contributions of the employer. They may not be allocated on the basis of the size of the accounts of the remaining employees since this might result in excessive gravitation to the accounts of the higher paid, or more permanent employees. Contributions of the employer are usually shared in the same proportion that the compensation of each employee bears to the compensation of all employees covered by the plan.

The forfeiture characteristics of the profit sharing plan would favor more permanent and more highly compensated employees. In a closely held corporation these employees are also frequently the stockholders. If "discriminatory practices", such as encouraging turnover among employees, or others, are avoided, it is possible for the real "career" employees to be well rewarded for their longevity by a profit sharing plan while still adhering to the legal requirements and sound personnel policy.

XII. WHAT TYPE OF PLAN SHOULD BE SELECTED FOR A PARTICULAR BUSINESS?

This will depend upon a thorough study of the business concerned. No fixed rule can be given without specific facts. Consideration of the points mentioned below may furnish a guide to solution of the cases that arise. Probably the most important consideration is the amount that the company can afford to spend for an employee benefit program. It then becomes a matter of getting as much of the objective accomplished as possible with the funds that are expected to be available. Other important considerations may be:

EMPLOYEE STATUS:

How many employees are to be covered? The fewer employees covered, the lower will be the cost as a rule. What is the age and salary range of these employees? Is the company presently paying pensions under some informal arrangement? Does it expect to be forced into paying pensions to some older employees? What type of employees work for the company? Are they predominantly transients, or temporary and seasonal? Is the payroll primarily an hourly payroll? What is the average tenure of employees?

FINANCIAL STATUS OF THE COMPANY:

What is the present cash position of the company? Does it have a large cash reserve that might be used advantageously to estab-

lish a pension plan with a completely funded "past service credit"? Can it more conveniently make annual payments toward providing the benefits? Have profits followed a stable pattern for ten or more years? Are they expected to continue to follow this pattern?

STOCKHOLDERS STATUS:
What is the nature and disposition of the stock? How much is held by stockholders who are also employees? Do they have substantial estates aside from any possible benefits under the plan?

INVESTMENT POLICY:
Is it desirable to provide for investment of the fund to any extent in the stock of the company, or to provide for loans to the company from the fund?

TYPES OF PLANS TO CONSIDER:
What types of plans are available? What are their advantages and disadvantages for the company and its employees?

The above considerations should lead to some tentative conclusions regarding the requirements of the company. If it has a large number of elderly employees approaching retirement age, it is probable that a profit sharing plan would not be suitable. It may take ten or more years before it will provide substantial retirement income, even if full contributions are made each year.

Perhaps the company would prefer to establish a pension plan in order to supplement the benefits of social security. If the company has widely fluctuating profits and losses, it is probable that a pension plan would not be the proper choice since payments must be made to it regularly whether profits are made or not. The past service costs alone might reach discouraging proportions if there are many employees with long service to be covered.

It is possible to adopt more than one plan. Each might cover the employees of a particular classification such as salaried or clerical or hourly paid workers, or the employees of an affiliated corporation. It is also possible to adopt two or more plans covering the same employees: a minimum benefit pension plan to provide a basic living income and a profit sharing plan to enable more liberal benefits if the profits of the company justified them in the future. If two or more such plans are adopted the overall contribution that can be made to them in a single year will be 25% of compensation of the covered employees under section 404 (a) (7), and both plans will be considered as parts of a single plan.

It is possible to carry a few elderly employees on a supplementary payroll while adopting the type of plan that best meets the needs of the majority of the employees.

If the company would benefit by increased incentive on the part of employees, then a profit sharing plan may offer many advantages.

If an immediate need exists for "protection" of employees against

disability or death, it coud be provided for under a profit sharing plan, since up to 50% of contributions of the employer can be invested in insurance contracts, if they are convertible into annuity contracts at retirement age. Meanwhile the remainder of the fund could be invested at fairly liberal rates of return.

If the company desired to adopt a pension plan, but to limit its commitment to a fixed amount each year (such as five per-cent to ten per-cent of payroll), and to simply provide employees with whatever benefit such contribution might provide by the time of their retirement, then it might choose to install a money purchase pension plan.

If the company desires to be free to invest the funds in its own stock or in other speculative or high yielding investments then it will probably choose a profit sharing plan. Under the pension plan a very conservative investment policy must usually be pursued since the funds must be carefully invested primarily for security of corpus. This would usually provide a very low rate of income such as that from government bonds or so-called "legal investments".

From the foregoing considerations the company should have in mind the general type of plan that most nearly fits its requirements. Then it is usually possible to modify existing types of plans to meet those requirements.

XIII. ARE THERE OTHER TYPES OF PLANS THAT MIGHT BE UTILIZED?

Yes. There are many different kinds of employee benefit plans that do not meet the requirements of section 401 for "qualification". In general they have disadvantages to the employer or to the employee that render them unacceptable to well-informed businessmen.

A thorough consideration of the advantages and disadvantages of such plans is beyond the scope of this article but, in brief, some of the most important types and their characteristics are as follows.

A. *"Non-Qualified" Pension Plans that are "funded"*

This type of plan has such serious disadvantages as to render it unacceptable. It may take the form of the company's paying premiums on annuity contracts for some or all of its employees, or of contributions to a "non-qualified" trust. Under sections 402 (b) and 403 (b) the employee is taxable upon amounts paid toward the purchase of an annuity or contributed to a trust for his benefit if he receives a "non-forfeitable" interest in the amounts contributed, even though he receives no present right to the funds. If he does not receive a "non-forfeitable" interest then the employer-company cannot get a deduction from taxable income for any amounts so contributed in the year of contribution under section 404 (a) (5). The employer in such case would never get a deduction since he

would not have paid the amount in the later year in which the employee's interest might become "non-forfeitable". The cost of operating such a plan would be prohibitive. The amounts paid, but for which no tax deduction would be allowed would, in effect, come out of earnings and profits after taxes and thus the entire amount would be paid by the owners of the company out of what might otherwise have been available for distribution as a dividend. This would more than double the cost to the stockholders of maintaining such a plan. If held in surplus instead of being turned over to a trustee or insurance company, then the amounts earned on such reserves would be fully taxable at usual corporate rates of up to 52% or more.

B. *The "Non-qualified" Pension Plan that is not "funded"*

This type of plan may consist merely of keeping an employee on the payroll of the company after he has reached retirement age. From the viewpoint of the company it is completely flexible since the employee's pension may be reduced or discontinued at any time. The company could deduct the payments in the year when paid as a business expense under sections 162 or 212. The employee would be unable to rely definitely upon the receipt of any retirement income except as the same might be required by a contract with the company. This plan loses the advantages of the earnings of the fund created by the accelerated tax deductions under "qualified" plans. In some limited situations it may be acceptable as a temporary substitute for a better plan.

C. *The Deferred Compensation Contract*

While not in reality a pension plan at all in the usual sense, the deferred compensation contract may be used for the benefit of a few key executives, or other individuals, without the necessity of covering any particular group of employees under such arrangements. The principal effect of this plan is to defer the receipt of compensation from the year in which it is earned until a later year in which it is likely that the employee will be in a much lower income tax bracket. It has no statutory authorization but has withstood numerous attempts by the Commissioner to include the amounts in the taxable income of the employee at different dates than those called for by its terms.[11]

The deferred compensation contract is merely an employment contract which provides for the payment in future years for services to be rendered in a current or intervening year. Usually payments in accordance with its terms are contingent until actually made. Such contingencies are frequently based upon the employee's continuing to serve the company in some limited capacity. It is essential that there be no

[11]Fred C. Hall, 15 TC 195 (1950); F. J. Wolfe, 8 TC 689, aff'd 170 F.2d 73 (9th Cir. 1948); but see 26 TC No. 131 of September 12, 1956, for application to closely held corporation's principal stockholders.

funding of the promised payment with a third party such as an insurance company or a trustee. This will cause the payments to be taxed to the employee currently.

D. *The "Split Dollar" Life Insurance Contract*

This is an arrangement whereby the company pays a portion of the premium on a policy of life insurance upon the life of a key employee approximating the increase in cash value of the policy. The employee pays the rest of the premium. His beneficiaries receive all of the proceeds over the cash value in the event of his death and the company receives a return of the money that it has paid out on the policy. This arrangement received the approval of the Treasury Department in Revenue Ruling 55-713. Under that ruling the employee is not taxed upon the amounts paid by the company for the policy. His beneficiaries are not taxed upon the proceeds received by reason of his death under section 101 (a). There are no tax advantages of consequence to the company since it amounts to the investment of a part of its surplus at little, if any, return. It is very beneficial to the employee who receives the insurance protection at very low cost. It is possibly useful in limited situations for key employees but it is in no sense a substitute for a "qualified" pension or profit sharing plan.

E. *The Employee Stock Option*

This type of employee benefit, like the deferred compensation plan, may be useful in a limited number of situations where it is desired to obtain the benefits of deferred compensation for a few employees. It is authorized by section 421 of the Internal Revenue Code of 1954. Under it an employee is allowed to purchase stock that is expected to go up in value at certain favorable rates without being taxed upon the differential as current compensation. It is important that all such arrangements follow the statute closely in view of the recent Supreme Court decision[12] that other types of stock options resulted in the realization of ordinary income whether intended to be "proprietary" or "compensatory" in nature.

XIV. WHAT ARE THE POSITIONS TAKEN BY ORGANIZED LABOR?

Labor leaders appear to prefer pension plans, but are unlikely to oppose the adoption of a profit sharing plan. The rank and file worker frequently is more interested in a current increase in wages than he is in having a retirement plan established under which he may or may not benefit. Profit sharing plans are generally quite popular with employees and many companies feel that they provide valuable incentive to workers.

[12]Comm'r v. LoBue, 100 L.Ed. 651 (1956).

The position of labor should be ascertained before adopting a plan. Sometimes demands that are in reality mere bargaining points are made. At other times the provisions of the pension plan are a genuine source of controversy.

Management may prefer a profit sharing plan rather than the fixed commitment of a pension plan, and adopt the former in order to avoid or delay adoption of the latter. In one case a company, after rejecting a union demand for a pension plan, notified union leaders of its intention to adopt a profit sharing plan. The union did not object. The company proceeded with the adoption of the profit sharing plan. The union then protested that it had not been permitted to bargain over the matter. The company's position was upheld by a National Labor Relations Board[13] and sustained by the court of appeals.[14] The court held that the union acquiesced by its silence and that the company had not unfairly refused to negotiate with the union.

XV. THE FUTURE

All indications are that pension and profit sharing plans will continue their rapid growth. Organized labor is actively demanding pension plans in many parts of the country and the working man has come to expect such plans of the company for which he works. Employers generally are finding it increasingly difficult to attract and to retain desirable employees without providing retirement programs and elaborate "fringe" benefits.

Social security has become very popular with the increased benefits and coverage of recent years. It has tremendous political significance which makes any drastic curtailment extremely unlikely. The same general considerations which have caused its extension are likely to force the extension of private pension and profit sharing plans. Many such plans are directly "integrated" with social security benefits and their benefits change as social security benefits change.

The *Kintner* case, mentioned in Part V, is an indication of the favor with which these plans are regarded by the courts and by the self-employed and professional groups.

The Jenkins-Keogh Bill is receiving continued study and consideration in Congress with the approval and backing of the American Bar Association and many other powerful professional and self-employed groups. They seem intent upon obtaining a measure of equality with the corporate employee of comparable station.

Tax-wise, there seem to be valid reasons why the professional and self-employed individual should be eligible for participation under a de-

[13] 103 N.L.R.B. 928 (1953).
[14] 210 F.2d 523 (3rd Cir. 1954).

ferred compensation plan or its equivalent. They are solely dependent upon their present and continued ability to work. Generally they do not enjoy the stability of income that is typical of salaried employees. In high profit years much more is paid out by them in taxes than is the case in low profit years due to the progressive surtax rates on higher incomes. This reduces the possibility of savings after taxes in years when savings for retirement might otherwise have been made.

The savings of the corporate executive, in the form of a contribution to a pension plan, are completely free of current income taxes. In some cases such savings will never be subject to federal income tax because of the increased exemptions available after retirement, accumulation of income under the trust, and exemptions from income and estate taxation after death. Meanwhile if the self-employed or professional worker is able to accumulate savings, the income on the investment of such savings is fully taxable. The value of any property owned will be fully included in his gross estate for federal estate tax purposes.

The future of pension and profit sharing plans appears bright indeed. The plans are in a specialized area of legal interest, but an area which involves so many legal considerations that it is a proper and necessary function of the general practitioner, no less than the specialist, to acquire a working knowledge of such plans, if the standards of service of the legal profession are to be maintained and encroachment by others prevented.

SEARCH AND SEIZURE IN MISSISSIPPI

*Henry L. Rodgers**

I. INTRODUCTION

Our Court has said, "One of the first things an officer should learn on assuming the duties of his office is the law bearing on his office and his duties. He does not become the *law of the land* by assuming office and can do no act unless the law authorized him to do so, which will affect any other person's rights, property, or liberty."[1] Again the Court has said, "If officers undertaking to enforce the law would conform to the rulings of the court, better results, less delay and greater saving of expense would result."[2] It is therefore hoped that a ready reference may be of use not only to the lawyers but also to the law enforcement officers of this state.

II. HISTORY

When Jefferson quoted John Locke, in the Declaration of Independence, as to the "inalienable rights" of a citizen, it became obvious to the informed and learned that there were certain rights men claimed independently of man-made laws, and "among these rights" was the sanctity of men's homes. The laws of Hammurabi, written in the early dawn of human thought,[3] and the Bible[4] both inform us that many hundreds of years before rules began to congeal into legal precepts and principles men considered it highly improper to enter or molest another man's home. The maxim: "Domus tustissimum cuique refugium atque receptaculm,"[5] was said by Lord Coke to be a "proposition all men confess and grant without 'proffe', argument or discourse."

Search warrants do not appear to have been known to early common law.[6] Lord Coke says: "Their legality was formerly doubted," and Lord Camden says: "they crept into the law by imperceptible practice."[7]

The legal limitations on arrest, search, and seizure always have been considered by our courts to be rights that existed prior to and independent of constitutional sanction.[8]

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*Circuit Judge fifth district, Mississippi.

1D'Acquilla v. Anderson, 153 Miss. 549, 120 So. 434 (1929).

2Powell v. State, 145 Miss. 237, 110 So. 513 (1926).

36 Enc. Brit. 159.

4Bible - Deut. 24, 10-11.

5"The habitation of each one is an inviolable asylum for him."

647 Am. Jur. 503.

7People v. Kemper, 13 Gray 454, Ann. Cas. 1914D 169 (1913); Tucker v. State, 128 Miss. 211, 90 So. 845 (1922).

8Iupe v. State, 140 Miss. 279, 105 So. 521 (1925).

The use of search warrants and writs of assistance, had become so oppressive in England that ten years before the Declaration of Independence, the House of Commons passed a resolution limiting their general use for the seizure of persons, their books and papers.[9] The abuse of search warrants and writs of assistance was perhaps the real reason that caused colonial citizens to flare into open rebellion.[10] The failure to include in the original body of the Constitution of the United States some restriction on search and seizure caused two states to reject the Constitution until the amendments had been adopted.[11]

III. THE REMEDY

In the outset let it be said that search and seizure are two distinct acts. The constitutional guaranty applies only when a search is made followed by a seizure, and does not prohibit the seizure of contraband where there is no need for a search, and where the contraband is fully disclosed "to the eye and hand."[12] Under the subject of seizure, officers may seize certain property as an incident to a lawful arrest without making a search.[13] On the other hand, it is often true that officers may make a lawful search and make no seizure.[14]

The purpose of the constitutional restriction is to prevent the agents of the state and federal government from the *unreasonable* use of tyrannical and oppressive power, and applies only to such agents.[15] It is not a guarantee against private persons.[16] Moreover, the federal Constitution applies to federal officers and not state officers,[17] and the Mississippi Constitution applies to state officers and not federal officers.[18]

The only purpose of a search warrant and the necessary oath, is to establish a lawful search and seizure.[19]

IV. MISSISSIPPI STATUTES

There are several forms in our Mississippi Code of 1942 permitting search and seizure for contraband, viz: search for stolen goods, sections 2604, 2605; intoxicating liquors, sections 2616 and 2617; marijuana and illegal drugs, section 6837; evidence of arson, section 5701; and illegal

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947 Am. Jur. 504.

10Boyd v. U. S., 116 U. S. 616, 29 L. Ed. 746 (1885); Weeks v. U. S., Ann. Cas. 1915 C 1177 (1914); Moore v. State, 138 Miss. 116, 103 So. 483 (1925); Falkner v. State, 134 Miss. 253, 98 So. 691 (1924).

11Hall, Cases on Constitutional Law (1926) at page 1414.

12Pebbles v. State, 57 So.2d 263 (1925); Harris v. State, 216 Miss. 895, 63 So.2d 396 (1953); State v. Quinn, 111 S.C. 174, 97 S.E. 62, 3 A.L.R. 1500 (1918); Owens v. Reese, 203 Miss. 322, 33 So.2d 834 (1948).

13Infra.

14Cofer v. State, 151 Miss. 761, 118 So. 613 (1928).

15Owens v. State, 133 Miss. 753, 98 So. 233 (1923).

16Miss. Const. § 23, Note 3.

17See, e.g., Armstrong v. State, 195 Miss. 300, 15 So.2d 438 (1943).

18Neilson v. State, 137 Miss. 170, 102 So. 166 (1924).

19Brooks v. Wynn, 209 Miss. 156, 46 So.2d 97 (1950).

game and fish, section 5856.

The code sections with reference to stolen goods and intoxicating liquors give detailed forms for both the affidavit and the search warrant. The stolen goods form is in practically the same form as the common law.[20]

It will be noted that each section of the code permitting search and seizure is worded differently. Sections 2614 and 6837 require that the affiant shall be a "credible person," while section 2406 has no such requirement. Again, sections 5856 and 5701 permit the officers to make the affidavit for search.

V. CONSTITUTIONAL KEY WORDS

Section 23 Miss. Constitution of 1890, and the 4th Amendment to the United States Constitution are not couched in the same language, but have the same meaning. The following emphasized words of the Mississippi Constitution will give a key to the judicial interpretation of the legal restrictions of the constitution.

Section 23, Art. 3, Mississippi Constitution 1890: "The people shall be secure in their persons, houses and possessions from *unreasonable* seizure and search; and no warrant shall issue without *probable cause* supported by *oath* or affirmation, specially *designating* the *place* to be searched and the *person* and *thing* to be seized." (Emphasis added.)

We find the first word of restriction under the constitution to be the word "unreasonable." Our courts have held that the remedy of search and seizure, is not against all search and seizure but the restriction is against the unreasonable use of the writ by the officers and agents of the government.[21]

Guilt of the accused is not a test as to whether or not the search was reasonable or legal.[22] It has been held, however, that every search and seizure which is not a lawful search is an "unreasonable" search.[23]

The violation of the constitutional guaranty against unreasonable search is said to be tantamount to compelling the defendant to testify against himself,[24] because the "home speaks with the same voice."[25]

Probable cause must exist before the affidavit for a search warrant is made.[26] An affidavit charging a crime is "probable cause."[27] The issuance of the warrant is an adjudication of the issuing officer that proba-

[20]19 Enc. Pleadings & Practice, par. 2 page 325.
[21]See, e.g., Leflore v. State, 197 Miss. 337, 22 So.2d 368 (1945).
[22]Adams v. State, 202 Miss. 68, 30 So.2d 593 (1947).
[23]Orick v. State, 140 Miss. 184, 105 So. 465, 41 A.L.R. 1129 (1925).
[24]Watson v. State, 133 Miss. 796, 98 So. 241 (1923).
[25]Tucker v. State, 128 Miss. 211, 90 So. 845 (1922).
[26]Elardo v. State, 164 Miss. 628, 145 So. 615 (1933).
[27]Bufkin v. State, 134 Miss. 1, 98 So. 452 (1923).

ble cause exists,[28] and this is conclusive[29] and cannot be inquired into.[30] When an officer is acting on "probable cause" without a warrant will be considered later.

VI. PROPER PROCEDURE TO OBTAIN AND EXECUTE SEARCH WARRANTS

A. *Oath or Affirmation*

The making of an oath is the beginning of the procedure to obtain the issuance of a search warrant.[31] The warrant must be obtained before the search is begun.[32] Our statutes on the making of an affidavit are directory, and therefore the affidavit need not be signed, provided the oath is actually taken.[33] Some states' constitutions require that the "oath" be an affidavit.[34]

It is necessary when the question is properly raised that the officer issuing the warrant be able to show that the warrant was issued on the affidavit of a "credible person."[35]

It is not every affidavit that will permit a search; the affidavit must comply substantially with the statutory requirements.[36]

B. *Affidavit Made Upon Information*

Where the affidavit to obtain the search warrant is made upon information obtained from a third party, it is necessary that the affiant state in the affidavit, not only that he "has reasons to belive" but he must state that "he does believe," (in the cases where the statute requires it) and his failure to so state will vitiate the search warrant.[37] The use of the word "suspects" is not sufficient,[38] but leaving out the word "good" does not vitiate the warrant.[39] The affiant's failure to show in his affidavit his belief as to the violation of the law will vitiate the search warrant.[40]

The information on which the affiant acts, must be information had at the time of making the affidavit, and must be information given to him as a fact and not as a mere rumor.[41] The information communicated must have been known to the informer at the time he informed the affiant.[42] The information here mentioned is such information as would

[28]See, e.g., Castellucio v. State, 165 Miss. 516, 146 So. 599 (1933).
[29]Johnson v. City, 179 Miss. 526, 196 So. 262 (1937).
[30]Armstrong v. State, 195 Miss. 300, 15 So.2d 438 (1943).
[31]Neilson v. State, 137 Miss. 170, 102 So. 166 (1924).
[32]Robinson v. State, 101 So. 706 (1924).
[33]Winters v. State, 142 Miss. 71, 107 So. 281 (1926).
[34]Lippman v. People, 175 Ill. 872 (1898).
[35]Serio v. Brookhaven, 208 Miss. 620, 45 So.2d 257 (1950).
[36]Boyd v. State, 164 Miss. 610, 145 So. 618 (1933).
[37]Turfitt v. State, 42 So.2d 737 (1949).
[38]Lancaster v. State, 188 Miss. 374, 195 So. 320 (1940).
[39]Creel v. State, 183 Miss. 158, 183 So. 510 (1938).
[40]Creel v. State, supra note 39.
[41]Norman v. State, 167 Miss. 690, 146 So. 639 (1933).
[42]McGowan v. State, 184 Miss. 96, 185 So. 826 (1939).

cause an ordinary cautious and prudent man, reasonable and without prejudice to believe the accused person to be guilty of the crime reported.[43] Information obtained because of the search will not aid the information necessary to establish "probable cause."[44]

The information necessary on which to act, must be information from a credible person, and this is true although the officer may have information he believes.[45] Section 2614 Mississippi Code 1942 requires that the affiant be a "credible person" and the affidavit should so state,[46] but the failure to so state will not vitiate a search warrant issued as a result of such an affidavit.[47] The officer, nevertheless, should be able to show that the affiant was a credible person, when his right to issue the warrant is brought into question, since the statute is not mandatory but directory.[48]

C. *Signing of the Affidavit*

The signing of an affidavit before a justice of the peace is sufficient and it is not necessary that the affiant hold up his hand.[49] The signing of a blank affidavit and sending it to a justice of the peace, without appearing before the justice and taking an oath is not sufficient.[50] On the other hand, the failure to sign an affidavit does not vitiate a search warrant provided an oath is actually made by the affiant.[51] Nor can a second search warrant be issued on an affidavit.[52]

D. *Date of the Affidavit*

Since the issuance of a search warrant is a judicial determination of probable cause the erroneous dating of the affidavit will not vitiate the search warrant.[53] An affidavit dated the day after the search warrant was issued, need not be amended.[54] And in a case where the affidavit was not dated, the court permitted the affidavit to be amended to show the proper date because of section 2535, Mississippi Code of 1942, and the supreme court held this to be proper.[55]

E. *Filing of the Affidavit*

The filing of the affidavit with the issuing officer is not necessary although the court indicated that the affidavit should be "lodged" with the justice of the peace.[56] This case bases the "lodging" rather than "filing"

[43]Loeb v. State, 133 Miss. 883, 98 So. 449 (1925).
[44]Adams v. State, 202 Miss. 68, 22 So.2d 593 (1947).
[45]Moore v. State, 138 Miss. 116, 103 So. 483 (1925).
[46]Turfitt v. State, 42 So.2d 737 (1949).
[47]Harper v. State, 209 Miss. 563, 47 So.2d 854 (1950).
[48]Serio v. Brookhaven, 208 Miss. 620, 45 So.2d 257 (1950).
[49]Cox v. State, 146 Miss. 685, 112 So. 479 (1927); Compare Jones v. State, 133 Miss. 801, 98 So. 342 (1923).
[50]Boyd v. State, 206 Miss. 573, 40 So.2d 303 (1949).
[51]Winters v. State, 142 Miss. 71, 107 So. 281 (1926).
[52]Gizzard v. State, 149 Miss. 323, 115 So. 555 (1928).
[53]Sykes v. State, 157 Miss. 600, 128 So. 753, 162 A.L.R. 1410 (1930).
[54]Hendrix v. State, 144 Miss. 87, 109 So. 263 (1926).
[55]Simmons v. State, 179 Miss. 713, 176 So. 726 (1937).
[56]Wince v. State, 206 Miss. 189, 39 So.2d 882 (1949).

of the affidavit on section 1812, Code of 1942, which has to do with civil cases lodged before a justice of the peace. This case would, therefore, indicate that section 2604, Code of 1942 and perhaps section 2614, would require a written affidavit although the constitution (section 23) does not so state. Many of the cases reported in Mississippi require that before testimony can be offered upon the trial, the affidavit must be produced or the loss or destruction thereof shown.[57] Other states have held the affidavit must be in writing.[58]

F. *Description of the Place*

The affidavit and search warrant must describe the place to be searched,[59] and there should be no variance between the affidavit and the search warrant.[60] It is not, however, necessary that the affidavit and search warrant be in the same words; because where contraband is found on property described in both the affidavit and search warrant, the describing of additional property in the warrant may be treated as surplusage.[61] Affidavit and search warrant which describe the property with reasonable certainty are sufficient to make the search of the property legal.[62] Any description, which will enable the officers to locate the property with reasonable certainty, is sufficient to authorize the search.[63]

The description in the affidavit and the search warrant need not be specific.[64] The description need only be clear and certain, for example: "33rd Ave. House No. 1009," located in a certain city is sufficient description[65] and a "Chevrolet Coach Car" has been held to be sufficient.[66]

There must be a description, however, and leaving out the description in a blank form affidavit vitiates any search on a warrant issued on such an affidavit.[67] The purpose of the description in the affidavit and the search warrant is to inform the officers where to search, and where officers go outside of the description in the warrant, the search is void.[68] But where the property is described properly, although stated as "premises" in addition to the description, the warrant is not void.[69] On the other hand, where the property is described as the "premises" of the accused, without describing the property, the warrant is void.[70]

57Infra.

58See Annot. 74 A.L.R. 1516 (1929).

59Carnaggio v. State, 143 Miss. 694, 109 So. 732 (1926); Dawsey v. State, 144 Miss. 452, 110 So. 239 (1926); Miller v. State, 129 Miss. 774, 93 So. 2 (1922).

60See, e.g., Pebbles v. State, 216 Miss. 790, 63 So.2d 236 (1953).

61Simmons v. State, 179 Miss. 713, 176 So. 726 (1937).

62Gilbert v. State, 198 Miss. 175. 21 So.2d 914, 169 A.L.R. 164 (1945).

63Mason v. State, 32 So.2d 140 (1947).

64Peebles v. State, 216 Miss. 790, 63 So.2d 236 (1953).

65West v. State, 42 So.2d 751 (1949).

66McGaha v. State, 176 Miss. 587, 169 So. 887 (1936).

67Spears v. State, 99 So. 361 (1924); Miller v. State, 129 Miss. 774, 93 So. 2 (1922).

68Taylor v. State, 134 Miss. 110, 98 So. 459 (1924).

69Mathews v. State, 134 Miss. 807, 100 So. 18 (1924).

70Rignall v. State, 134 Miss. 169, 98 So. 444 (1923); Watson v. State, 98 So. 241 (1923).

The failure to describe the following places specifically has been held to vitiate the search warrant: "grounds and outhouse,"[71] yard,[72] woods and possessions, discussed,[73] store-house,[74] automobile in yard,[75] purse,[76] trunk,[77] buggy,[78] wrong automobile,[79] and "premises" of deceased person.[80]

G. *Description of the Thing*

The affidavit and the search warrant must describe with reasonable certainty the "thing" to be seized so as to identify it.[81] Where the search warrant describes the place to be searched and the "thing" to be "searched for," the officer cannot break into an automobile on a near-by highway which is not described in the warrant and seize contraband without probable cause for the search.[82] Nor is it permissible to seize "shot-gun shells" when the officers are searching for liquor described as the "thing."[83] The description of the "thing," however, does not prevent a search as an incident to an arrest, and the seizure of letters on the person of the prisoner.[84] The failure of the search warrant to describe contraband does not prevent seizure, if the search is proper under a search for other property.[85]

H. *Description of the Person*

It would appear that there has been some confusion with reference to this part of the constitution, as to whether or not the name of the person to be seized is necessary in a search warrant, and whether or not the owner of the property should be named. Our court has said, "The immunity, it will be observed, covers not only the search and seizure of property but persons as well, and the common law rules and statutes permitting and regulating arrest, or seizure of property, cannot be said to be unreasonable if made under the same circumstances that justify arrest or seizure of persons."[86] Where the name of the person to be seized, and the place to be searched was filled in by the officer after the issuance of the warrant, and after the search was made, the search was void.[87] And where the name of "Will Rogers" was changed in the search warrant,

[71]Taylor v. State, 134 Miss. 110, 98 So. 459 (1924); Deaton v. State, 137 Miss. 164, 102 So. 175 (1924).
[72]Fatimo v. State, 134 Miss. 175, 98 So. 537 (1924).
[73]Falkner v. State, 134 Miss. 253, 98 So. 691 (1924).
[74]Stephens v. State, 183 Miss. 829, 184 So. 327 (1938).
[75]Brooks v. Wynn, 209 Miss. 156, 46 So.2d 97 (1950).
[76]Haney v. State, 43 So.2d 383 (1949).
[77]Page v. State, 208 Miss. 347, 44 So.2d 459 (1950).
[78]Toliver v. State, 98 So. 342 (1923).
[79]Vaughn v. State, 136 Miss. 314, 101 So. 439 (1924).
[80]Parkinson v. State, 145 Miss. 237, 110 So. 513 (1926).
[81]47 Am. Jur. 524.
[82]Brooks v. Wynn, 209 Miss. 156, 46 So.2d 97 (1950).
[83]Cofer v. State, 152 Miss. 761, 118 So. 613 (1928).
[84]Infra.
[85]Infra.
[86]Moore v. State, 138 Miss. 116, 103 So. 483 (1925).
[87]Miller v. State ,129 Miss. 774, 93 So. 2 (1922).

without amending the affidavit, the warrant is void.[88]

Although "John Doe" warrants are void in Mississippi where such name is in aid of the description of the "place and thing,"[89] and warrants issued in the name of a deceased person, where used as a part of the description, are void;[90] nevertheless, in a later case there is this language: "Where the premises to be searched were sufficiently described, otherwise, the name of the owner or occupant of the building was no essential in aid of the description of the place to be searched." It was held that a search warrant to an "unknown occupant" was sufficient.[91]

There is an interesting case on the point of "person to be seized" reported in 1925, where a man had rented a house from a Mr. Pepper, but Mr. Pepper, who was absent, still had the right to live in the house. Defendant's father-in-law and his brother-in-law also lived with the defendant and had the right to use the entire house. A still was found in the attic, on a search warrant in which defendant's father-in-law and brother-in-law were named. The Court held that the search was void as against the unnamed defendant. It is here apparent that each of the persons named owned and occupied the same house and the description of the "place" was the same. The only difference as to the description of each possessor was his name.[92]

I. *Owner and Occupant*

The owner of the "thing" for which the search warrant is issued in the case of stolen goods need not be named.[93]

Where the premises are properly described and the affiant does not know the occupant, nor the owner, but has probable cause to believe and does believe that a crime is being committed on the premises, he is not required to wait until he can learn the name of the owner or occupant before causing a warrant to be issued.[94] It seems to be the general rule of law that the search warrant is good, if it properly describes the place although the name of the occupant is left out.[95] Still, if the name of the occupant is known, it should be stated.[96] In another case decided in 1927, the court differentiated between the occupancy of a husband and wife and other persons and pointed out that, "We are not here concerned with the validity of the arrest of a person not named in the affidavit but only with the validity of the search of the premises."[97]

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[88]Gizzard v. State, 149 Miss. 323, 115 So. 555 (1928).
[89]Brewer v. State, 142 Miss. 100, 107 So. 376 (1926).
[90]Parkinson v. State, 145 Miss. 237, 110 So. 513 (1926).
[91]Banks v. City of Jackson, 152 Miss. 844, 120 So. 209 (1929); Traxler v. State, 67 So.2d 292 (1953).
[92]Harrell v. State, 140 Miss. 737, 106 So. 268 (1925).
[93]Wince v. State, 206 Miss. 189, 39 So.2d 822 (1949).
[94]Banks v. City of Jackson, 152 Miss. 844, 120 So. 209 (1929).
[95]Annot. 27 A.L.R. 753, 39 A.L.R. 843 (1925).
[96]Moore v. State, 138 Miss. 116, 103 So. 483 (1925).
[97]Cox v. State, 146 Miss. 685, 112 So. 479 (1927).

It would, therefore, seem that the search warrant is in effect a warrant for a search and a warrant for arrest. If the officers find contraband in the possession of a person "in his presence" they could arrest him without a warrant, but they certainly could not find the contraband and later arrest the defendant who was not present, unless his name was in the warrant. In order to "seize the person" (who is not present) charged with a crime, his name would necessarily have to be in the warrant.[98]

J. *Issuance*

Although Section 167, Mississippi Constitution of 1890, makes all civil officers conservators of the peace, all civil officers cannot issue a search warrant. A justice of the peace, where an affidavit is lodged, may issue a search warrant,[99] and since the mayor of a town (where there is no police justice) is an ex-officio justice of the peace, he may issue search warrants.[100] A mayor of a town situated in two counties may issue search warrants in either county.[101] A justice of the peace may issue search warrants returnable to other justices of the peace in the same county.[102] A clerk of a municipality is not such an officer as is permitted to issue a search warrant.[103] A mayor in a town where there is a police justice cannot issue a search warrant.[104] All judges may issue warrants[105] but the cleark of the circuit court cannot.[106]

K. *Return*

When a search warrant is not returnable instanter, it is essential that it should be dated, and a failure to write in the date vitiates the warrant.[107]

The intoxicating liquor statutes require that the writ shall be returned instanter or on a date stated,[108] and a search warrant with a blank return date, or no return date is void,[109] and a search warrant returnable to a past date is also void.[110] The stolen goods statute requires that the officer "bring them forthwith" before the issuing officer and the warrant should so state.[111] A delay of one day in serving a search warrant re-

98Infra.

99Bufkin v. State, 134 Miss. 1, 98 So. 452 (1923); City of Jackson v. Howard, 135 Miss. 102, 99 So. 497 (1924).

100Falkner v. State, 134 Miss. 101, 98 So. 345 (1924); Simmons v. Town of Louin, 213 Miss. 482, 57 So.2d, 133 (1952).

101Harthaway v. State, 188 Miss. 403, 195 So. 323 (1940).

102Conwill v. State, 147 Miss. 118, 112 So. 868 (1927).

103Jackson v. Howard, 134 Miss. 101, 99 So. 345 (1924).

104Palmer v. City of Lumberton, 153 Miss. 886, 122 So. 199 (1929).

105Claunch v. State, 208 Miss. 767, 45 So.2d 581 (1950).

106Martin v. State, 190 Miss. 32, 199 So. 98 (1940).

107Johnson v. State, 202 Miss. 233, 31 So.2d 127 (1947); Nobles v. State, 77 So.2d 288 (1955).

108Miss. Code Ann. § 2614 (1942).

109Powell v. State, 146 Miss. 677, 111 So. 738 (1927).

110Nobles v. State, 77 So.2d 288 (1955); Buckley v. State, 150 Miss. 808, 117 So. 115 (1928).

111Miss. Code Ann. § 2605 (1942).

turnable instanter does not render process ineffective.[112] The officer may amend his return, if necessary, to show the day of execution,[113] or justice of the peace district.[114] But where a search warrant is returnable on a certain day and not served until several days after the return date, the warrant is void.[115]

A justice of the peace may make the writ returnable before himself[116] or any other justice of the peace in the county where the case is triable.[117] The justice of the peace may even make the writ returnable before a circuit judge[118] or a county judge,[119] but no return of the officer is necessary, if no contraband is found.[120]

L. *To Whom Addressed*

Our liquor laws require that the process be addressed to "the sheriff or any constable," (or if in a municipality to "the sheriff, or any constable or marshal or policeman").[121] On the other hand our law with reference to search for stolen goods requires that the warrant be addressed to "any lawful officer."[122] The game and fish law, and the law with reference to arson, requires that the officer of that department serve the warrant.[123] The law with reference to search for illegal drugs will be addressed to the regular officers.[124] It has been held that the State Militia, on proper orders of the Governor, are peace officers and may serve a search warrant.[125] A coroner cannot serve a search warrant, so long as there are other officers who can perform the duty, and only then when a proper order has been entered by the issuing officer setting out the facts. The writ should not be addressed to the coroner but to any lawful officer.[126]

A search warrant is not void merely because the justice of the peace accompanies the officers to serve the writ,[127] but a district attorney is not a peace officer and cannot serve a search warrant.[128] Special officers appointed by the court cannot serve a warrant until there is an application in writing for such an appointment.[129] It would be presumed that the order of a circuit judge would at least carry as much weight as the order

112Jenkins v. State, 207 Miss. 281, 42 So.2d 198 (1949).
113Banks v. City of Jackson, 152 Miss. 844, 120 So. 209 (1929).
114Washington v. State, 152 Miss. 154, 118 So. 719 (1928).
115Taylor v. State, 137 Miss. 217, 102 So. 267 (1924).
116Miss. Code Ann. § 2617 (1942).
117Reynolds v. State, 136 Miss. 329, 101 So. 484 (1924).
118Hanson v. State, 174 Miss. 88, 164 So. 9 (1935).
119Watkins v. State, 158 Miss. 339, 130 So. 477 (1930).
12047 Am. Jur. 528.
121Miss. Code Ann. § 2614 (1942).
122Id. § 2605.
123Id. § 5856.
124Id. § 6837.
125State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).
126Millwood v. State, 198 Miss. 485, 23 So.2d 496 (1945).
127Johnson v. State, 146 Miss. 593, 111 So. 595 (1927).
128Adams v. State, 202 Miss. 68, 30 So.2d 593 (1947).
129Claunch v. State, 208 Miss. 767, 45 So.2d 581 (1950).

of the justice of the peace. It would follow therefore, that an order of the circuit judge stating that "good causes were shown" under this code section is sufficient to permit the court to direct the appointment of a "special officer" to serve the writ.[130] A search warrant directed to any officer "of the Town of Louin" could be served by the sheriff;[131] also, a search warrant directed to any lawful officer could be served by the sheriff.[132]

M. *Execution*

When a search warrant has been placed in the hands of the officer to be executed, it becomes his duty to execute it, the same as any other process. He is criminally liable if he refuses to do so.[133] The officer is required to serve it in the manner required by law: "to proceed in the day time or night time, to enter by breaking if necessary, and to diligently search."[134] He is, however, precluded from searching any other place than that described in the warrant,[135] although he may go over the property twice so long as it is one continuous search.[136] It is apparent that each warrant should be served in the manner designated under that particular section of the law under which the officer is acting; for example: under the liquor law it is said, "A copy shall be served on the owner or person in possession, if found present or readily found."[137] There is a case where the officer had a search warrant and so advised the defendant who was present, and although he never gave the defendant the copy, the court held the search valid.[138] This case was approved later in a case where a sheriff had a search warrant to search an automobile, but did not serve the warrant.[139] In this case, however, it was noted that there was "no objection to the evidence." In another case where the officer put the search warrant on the table, and did not inform the defendant of the warrant until after the search the court held, "It was too late then to legalize the search retroactively."[140] In another case, where the defendant was not present, and the officer put the copy of the warrant on a bed, the court held the service proper, "since the defendant was not readily found." In this case the court held that the civil process statute section

130Miss. Code Ann. § 1877 (1942).
131Simmons v. Town of Louin, 213 Miss. 482, 57 So.2d 133 (1952).
132Mathews v. State, 134 Miss. 807, 100 So. 18 (1924).
133Miss. Code Ann. § 2136 (1942).
134Id. § 2614.
135Vaughn v. State, 136 Miss. 314, 101 So. 439 (1924).
136Johnson v. State, 146 Miss. 593, 111 So. 595 (1927).
137Miss. Code Ann. § 2614 (1942).
138Forshee v. State, 152 Miss. 566, 120 So. 462 (1929).
139Carr v. State, 187 Miss. 535, 192 So. 569 (1940).
140Adams v. State, 202 Miss. 68, 30 So.2d 593 (1947); Compare Brown v. State, 77 So.2d 694 (1955).

1859, Miss. Code of 1942, did not apply to the service of search warrants for intoxicating liquor.[141]

It is evident that the officer cannot make the defendant take the process, and it has been held in the service of a civil process that where the defendant would not take the process nor listen to the reading of the process, the service was good although a copy was not served on defendant.[142]

The officer must act promptly in making the search, and cannot wait until several days after the return date to serve the writ.[143] He must serve the process within a reasonable time.[144] He may, however, wait until the next day on a warrant returnable "instanter."[145] Moreover, the service of process is not void because it is served on the wife of the owner.[146] A search is not void although the warrant was handed the defendant the very instant the seizure was made.[147] A search begun illegally is not perfected by later obtaining a search warrant.[148] Since most of the sections of the code direct methods of service, each section should be consulted before proceeding.[149]

It has been said that an officer's return is not necessary if the goods ordered seized are not found,[150] but since the officer is liable for wrongfully serving a writ, and the law is strictly construed against the agents of the state,[151] an officer's return should be made at or near the time of the service of the warrant.[152] An officer's return may be amended to show the true facts during the trial[153] and may be questioned by defendant.[154]

It is interesting to note that under our liquor statutes the officer is directed in one section,[155] to hold the contraband "until disposed of by law," and in another section,[156] under the same law the officer is directed to "seize" and to "destroy and render useless without formal order of the court," not only the intoxicating liquor but "all such things" used in connection therewith except vehicles. On the other hand a method is set up whereby the vehicles and appliances may be claimed, and the courts

141Outlaw v. State, 208 Miss. 13, 43 So.2d 661 (1949); Buxton v. State, 205 Miss. 692, 39 So.2d 310 (1949).
142Story v. Ware, 35 Miss. 399 (1858).
143Taylor v. State, 137 Miss. 217, 102 So. 267 (1924).
14447 Am. Jur. 526.
145Jordan v. State, 147 Miss. 24, 112 So. 590 (1927).
146Washington v. State, 152 Miss. 154, 118 So. 719 (1928); Banks v. State, 152 Miss. 844, 120 So. 209 (1929).
147Holston v. State, 161 Miss. 654, 137 So. 501 (1931).
148Robinson v. State, 136 Miss. 850, 101 So. 706 (1924).
149See Miss. Code Ann. (1942) §§ 2604, 2617, 5701, 5856, 6837.
15047 Am. Jur. 528.
151Norman v. State, 167 Miss. 690, 146 So. 639 (1933); Elardo v. State, 164 Miss. 628, 145 So. 615 (1933).
152Conwill v. State, 147 Miss. 118, 112 So. 868 (1927).
153See Paragraph No. 41; Washington v. State, 152 Miss. 154, 118 So. 719 (1928).
154Miss. Code Ann. § 1880 (1942).
155Id. § 2614.
156Id. § 2618.

have permitted the use of the old "writ of prohibition" to prevent the sale of articles under the above section.[157]

Our court has been very careful to follow the exact wording of the statute; so that it has been held that vehicles may not be confiscated when they were used "in the attempt" to violate the liquor law.[158] Again our court has said that the "stigma of no property rights" is limited to the property described in the statute, and that a suitcase is not among the list of property set out under this code section.[159]

Our stolen property law, requires that the officer "bring them . . . forthwith before the undersigned," and it would seem that the stolen goods must be first brought into court before they are delivered to the owner so that they can be used as evidence against the defendant.[160]

The fire marshal is not required to return the evidence to the issuing officer, because his investigation is private.[161] He is required to remove combustible material from buildings.[162]

The game warden is required to seize . . . and hold the same subject to the order of the Commission,[163] but edible fish and game may be given to charitable institutions.[164]

Our gambling laws provide that all appliances shall be destroyed, and all moneys shall be accounted for by the officer making the seizure.[165] The court may require the return of property wrongfully seized and property not contraband, after it is no longer needed as evidence.[166]

VII. WAIVER AND CONSENT TO SEARCH

Just as a property owner has the right to invite guests into his home, he has the right to waive the necessity of a search warrant, but he must be in possession of the facts. If he knows the officers have an illegal search warrant and permits a search, he cannot later complain.[167] And an agent in charge and in possession of the property, may waive the service of a search warrant upon him.[168] But it is not necessary to obtain permission to search a particular thing when the officer has a legal search warrant for the place where the particular thing is located, such as: a

157Ownes v. Reese, 203 Miss. 322, 33 So.2d 834 (1948).
158Powell v. State, 137 Miss. 464, 102 So. 540 (1925).
159Edward S. House v. Davis, 124 Miss. 485, 98 So. 849 (1920).
160Miss. Code Ann. § 2605 (1942).
161Id. § 5701.
162Id. § 5702.
163Id. § 5865.
164Id. § 5848.
165Id. § 2196.
16647 Am. Jur. 536, 531, 529.
167Faulk v. State, 127 Miss. 894, 90 So. 481 (1921); Baskin v. State, 92 So. 556 (1922).
16847 A. Jur. 548.

truck;[169] a paper bag;[170] kegs;[171] hunting jacket;[172] a sack in the pocket, where officer sees whiskey;[173] or where the accused is legally under arrest.[174]

The waiver and consent must be voluntary,[175] and where the accused neither consented nor objected to a search without a warrant, there was no consent.[176] Where the defendant submitted to the sheriff and turned over his gun, he did not consent.[177] Where the accused neither consented nor objected to an illegal search he did not waive the necessity of a search warrant.[178] Again, where an officer said he smelled whiskey and was going to look for it, the fact that the accused said he was welcome to look did not waive nor give consent to an illegal search already begun;[179] because after an illegal search has begun consent cannot be obtained justifying the accomplished illegal trespass.[180]

Although a wife may accept legal process,[181] she cannot waive process and consent to the illegal search of the home.[182] There are, however, some states that hold that the wife may waive and consent to such a search.[183]

One may also voluntarily open his suit-case and thereby waive the necessity of a search warrant,[184] or tell the sheriff to look for the shot-gun and thereby waive the necessity of a search warrant.[185]

VIII. WHO MAY CLAIM CONSTITUTIONAL IMMUNITY

We have seen that one may waive his constitutional right of immunity by consenting to a search without a search warrant,[186] and it is also true that one may waive his constitutional right by being outside the protection of the constitution,[187] either as a fugitive from justice,[188] or by having committed an indictable offense.[189]

It is also true that one cannot claim a constitutional right in prop-

169Stewart v. City of Jackson, 178 Miss. 709, 174 So. 56 (1937).
170Toliver v. State, 133 Miss. 789, 98 So. 342 (1923); West v. State, 42 So.2d 751 (1949).
171Williamson v. State,140 Miss. 841, 105 So. 479 (1925).
172Quick v. State, 192 Miss. 789, 7 So.2d 887 (1942).
173Johnson v. State, 179 Msis. 446, 176 So. 164 (1937).
174Infra.
175Banfill v. Byrd, 122 Miss. 288, 84 So. 227 (1920).
176Boyd v. State, 164 Miss. 610, 145 So. 618 (1933).
177Cofer v. U. S. 37 Fed. 2d 677 (5th Cir. 1930).
178Lancaster v. State, 188 Miss. 374, 195 So. 320 (1940).
179Morton v. State, 136 Miss. 284, 101 So. 379 (1924); Smith v. State, 133 Miss. 730, 98 So. 344 (1923).
180Adams v. State, 202 Miss. 68, 30 So.2d 593 (1947).
181Amos v. U. S., 255 U. S. 313, 65 L. Ed. 654 (1920).
182Cofer v. U. S., 37 Fed. 2d 677 (5th Cir. 1930). See Annot. 27 A.L.R. 723 (1922).
18347 Am. Jur. 550.
184City of Hattiesburg v. Beverly, 123 Miss. 759, 86 So. 590 (1920).
185Cobb v. State, 83 So.2d 833 (1955).
186See Aliens: 2 Am. Jur. 468.
187Ellis v. State, 86 So.2d 330 (1956); Prisoners: 47 Am. Jur. 509.
188Monette v. Toney, 119 Miss. 846, 81 So 593 (1919).
189Kennedy v. State, 139 Miss. 579, 104 So. 449 (1925).

erty he does not own; nor claim constitutional immunity against unreasonable search unless *his* constitutional right has been violated.[190]

This rule does not apply to a husband or wife of the owner, because both have the right of possession and either can claim violation of their constitutional rights, although the search warrant is addressed to the legal owner. The court has said, "The relation of husband and wife is such that both possess the premises of the home when living there regardless of which one may rent or own it.[191] On the other hand a search warrant addressed to either may be used against the other spouse.[192]

The husband and wife rule does not extend to visitors in the home,[193] or employees.[194] Contraband discovered on the property occupied by husband and wife is presumed to belong to "Adam and not Eve",[195] and contraband found on a young daughter in the home is presumed to belong to the father.[196] A grown son, who lives elsewhere, cannot claim immunity against an illegal search. He is bound by the same rule; that having no interest in the property, he cannot set up his father's constitutional right.[197] A young man running with a paper bag from property being legally searched could be stopped by the officers, and the bag searched.[198]

It has also been held that one who does not claim an interest in personal property cannot object to an illegal search.[199] It has been held, however, that a suitcase taken from the hands of a person who claims no interest in the suitcase, can claim immunity from illegal search.[200] A suitcase left on a moving train cannot be seized by the officers and searched where there was no probable cause for arrest.[201] Search after arrest,[202] and arrest on "probable cause," will be examined later.[203]

IX. SEARCH OF THE PERSON

There is no statute in Mississippi, nor is there common law, authorizing the issuance of a search warrant for the search of the person,[204] and a search warrant issued to search the person of the accused is void;[205] nor

190Rose v. State, 76 So.2d 835 (1955); McBride v. State, 73 So. 2d 154 (1954).
191Brewer v. State, 142 Miss. 100, 107 So. 376 (1926).
192Cox v. State, 146 Miss. 685, 112 So. 479 (1927).
193Barton v. State, 165 Miss. 355, 143 So. 861 (1932).
194Annot. 86 A.L.R. 346 (1932).
195Wyle v. State, 151 Miss. 897, 119 So. 825 (1929).
196Quick v. State, 192 Miss. 789, 7 So.2d 887 (1942).
197Roberts v. State, 153 Miss. 622, 121 So. 279 (1929).
198West v. State, 42 So.2d 751 (1949).
199Rose v. State, 76 So.2d 835 (1955); Ross v. State, 140 Miss. 367, 105 So. 846 (1925).
200Webb v. Town of Sardis, 143 Miss. 92, 108 So. 442 (1926).
201Harris v. State, 209 Miss. 183, 46 So.2d 194 (1950).
202Infra.
203Infra.
204Butler v. State, 135 Miss. 885, 101 So. 193 (1924).
205Comby v. State, 141 Miss. 561, 106 So. 827 (1926).

is evidence obtained by the illegal search of a person, before a lawful arrest is made, admissible in evidence.[206]

An officer has no right to search a suitcase in the hands of an accused, who is not under lawful arrest.[207] On the other hand, where the officer has "probable cause" to make an arrest, because accused said he had whiskey in a sack, the officer could make an arrest and search a sack,[208] but could not search kegs, when he had no probable cause for an arrest;[209] nor fire at a person, causing him to drop a sack which he searched.[210] Again, an officer is not permitted to search the person of a woman and take from her a key in order to find contraband.[211]

A comparison might be drawn between a case where the officers were legally searching the property of the father and a son ran out with a paper bag,[212] and a case where the officers on the street took from the hands of the accused a bag which they searched.[213] The *Lewis* case[214] should be studied along with a case where the officers searched an automobile and later went into a place of business and searched the accused.[215]

It should be noted, however, that a search warrant which directs the officers to search certain property and the "person of the defendant," is not void where the person of the defendant was not searched, since the extra words may be treated as surplusage.[216] The search of a person's mail while he is in jail is not a violation of the constitution.[217]

X. SEARCH OF MOVABLE PROPERTY, WITHOUT WARRANT

Since an officer is presumed to know the law,[218] and the law is strictly construed against the officers and agents of the state,[219] it is always best, if possible to obtain a proper search warrant, even to search personal property which may be searched under a statute permitting the search of vehicles, etc.[220]

Public necessity, public policy, and the police power of the state permits the officer to make a search of *certain* movable property, upon

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206Robinson v. State, 143 Miss. 247, 108 So. 903 (1926).
207Webb v. Sardis, 143 Miss. 92, 108 So. 442 (1926).
208Johnson v. State, 179 Miss. 446, 176 So. 164 (1939).
209Thomas v. State, 208 Miss. 264, 44 So.2d 403 (1950).
210Duckworth v. Taylorsville, 142 Miss. 440, 107 So. 666 (1926).
211Lewis v. State, 198 Miss. 767, 23 So.2d 401 (1945).
212West v. State, 42 So.2d 751 (1949).
213Webb v. Sardis, supra note 207.
214Canteberry v. State, 142 Miss. 462, 107 So. 672 (1926).
215Kelly v. State, 43 So.2d 383 (1949).
216Hendricks v. State, 144 Miss. 87, 109 So. 263 (1926).
217Ellis v. State, 86 So.2d 330 (1956).
218U. S. F. & G. v. State, 121 Miss. 369, 83 So. 610 (1919).
219See, e.g., Adams v. State, 202 Miss. 68, 30 So.2d 593 (1947).
220Mapp v. State, 148 Miss. 739, 114 So. 825 (1927); Parkinson v. State, 145 Miss. 237, 110 So. 513 (1926); Orick v. State, 140 Miss. 184, 105 So. 465 (1925).

"probable cause" without a search warrant,[221] but this right does not extend to the search of such movables after they have come to rest on private property.[222] The law, however, has always recognized that the practicability of obtaining a search warrant for swiftly moving vehicles, and the practicability of obtaining a search warrant for real estate are to be judicially differentiated.[223]

We have under our Mississippi law several statutes which permit the search of certain property for contraband.[224] It is noticeable that there are loose words in both statutes mentioned and the court will have to define what is intended by: "Any other vehicle" and "other package." In the *Martin* case[225] the court seemed to hold that "other vehicle" was applicable to "the search of an automobile and other means of transportation mentioned." It has, also, been held that the statute does not include the "saddle" on a horse.[226]

The statutes with reference to search of movables, not only make it the duty of the officer to search "on probable cause," but announce the public policy that "such officer proceeding in good faith shall not be liable . . . for such a search and seizure without a warrant." Nevertheless, the burden is on the officer to show to the "satisfaction of the judicial mind," that the officer had "probable cause" to make a search, before his testimony will be admissable.[227] The state, therefore, is required to prove in the trial of a case "probable cause" by showing the facts on which the officer claimed the right to search without a search warrant,[228] and in so doing, the officer is required to state the name of the person from whom he received his information and of what the information consisted, so that the court may determine whether or not the informer is a "credible person" and whether or not the information was sufficient to establish "probable cause."

An officer is not permitted to search movables, just because he "suspects" they contain contraband, without a search warrant; nor may he search such vehicles because he "believes" they contain contraband, unless his belief is based on facts sufficient to establish "probable cause."[229] The facts on which the officer acts, must be such as would be tantamount to evidence or such facts as would lead a man of ordinary caution and prudence to entertain an honest belief in the guilt of the

[221]47 See Annot. 27 A.L.R. 733; 39 A.L.R. 829; 74 A.L.R. 1400 (1931).
[222]Boyd v. State, 206 Miss. 573, 40 So.2d 303 (1949).
[223]Moore v. State, 138 Miss. 116, 103 So. 483 (1925).
[224]See §§ 2615 and 5856 Miss. Code 1942.
[225]Martin v. State, 190 Miss. 898, 2 So.2d 143 (1941).
[226]Canteberry v. State, 142 Miss. 462, 107 So. 672 (1926).
[227]Haney v. State, 43 So.2d 383 (1949); Moore v. State, 138 Miss. 116, 103 So. 483 (1925).
[228]Hamilton v. State, 149 Miss. 251, 115 So. 427 (1928); McNutt v. State, 143 Miss. 347, 108 So. 721 (1926).
[229]Canteberry v. State, 142 Miss. 462, 107 So. 672 (1926).

accused.[230] Information received ninety days before the search would not be sufficient to establish "probable cause."[231] It would seem that the accused's reputation could not aid in establishing probable cause since the court has held that the reputation of a "place" is not admissible to establish "probable cause."[232]

XI. SEARCH INCIDENT TO AN ARREST

Before making a study of the acts of an officer in searching prisoners and places, as an incident to an arrest, it is necessary to understand the authority of the officers to make the arrest.

There are two kinds, classes or grades of officers, and the officer's right to search depends upon the duty of his office. The first class has a general duty to arrest. The second class has a limited duty or right to arrest and consequently a limited right to search. Officers with the general duty of arrest are: conservators of the peace; police offiicers and marshals of cities and towns;[233] civil officers;[234] judges,[235] justices of the peace;[236] members of boards of supervisors;[237] mayors in towns without police justices;[238] Governor's investigators.[239]

Officers with limited duties are: election managers,[240] civil defense officers;[241] highway patrol officers;[242] county patrol officers;[243] who are designated as "peace officers," but there is another section of the code that limits their duties;[244] game wardens;[245] motor vehicle comptroller's field men;[246] officers appointed by the court when regular officers are disqualified;[247] state militia, when properly called out by the Governor;[248] Governor's extradition agent;[249] special investigators in Department of Public Safety;[250] health officers;[251] probation officers;[252] and hotel managers.[253]

Coroners are conservators of the peace but are not peace officers, with

230Loeb v. State, 133 Miss. 883, 98 So. 449 (1923).
231Gardner v. State, 145 Miss. 210, 110 So. 588 (1926).
232State v. Sisk, 209 Miss. 174, 46 So.2d 191 (1950).
233Miss. Code Ann. § 2467 (1942).
234Miss. Const. § 167.
235Miss. Code Ann. § 1655 (1942).
236Id. § 2568.
237Id. § 2885.
238Id. § 3374 as amended Miss. Laws 1950 ch. 491-103.
239Miss. Laws 1947 ch. 3 § 3980-5.
240Miss. Code Ann. § 3205 (1942).
241Id. § 8610-20.
242Id. § 8082.
243Id. § 8062.
244Id. § 861.
245Id. § 5856.
246Id. §§ 9392, 8082 A-4, 10040, 10008-15.
247Id. § 3906.
248State v. McPhail, 180 So. 387 (1938).
249Miss. Code Ann. §§ 2581, 3984 (1942).
250Id. § 2297.
251Id. §§ 7129-43, 7043.
252Miss. Laws 1956 ch. 524. § 14.
253Miss. Code Ann. § 7156.

general power of arrest, unless and until it appears that the sheriff is not available to serve the process,[254] or search warrants.[255] Highway patrolmen are not peace officers, and can arrest within their specific authority as patrolmen or as private citizens.[256]

Search incident to an arrest is an entirely different field from the intended restrictions set out in the constitutions of the state and federal governments although it must still be a "reasonable" search, and the arrest must be on "probable cause," or with a warrant. It is not a search for contraband, although contraband may be discovered as a result of an arrest. It is a common law duty, as well as a so-called right of an officer, to make an investigation for the purpose of prevention and prosecution of crime.[257] This form of search grows out of public necessity and public policy.[258] The officer, after an arrest, is required to search the prisoner, to discover weapons and means of escape,[259] to take from the prisoner any property connected with the crime and hold for the disposition of the court[260] evidence that may be used against defendant,[261] or that may give a clue to the crime or to the identification of the criminal,[262] and to take any weapons that would permit the accused to commit an act of violence.[263] This principle has not been readily recognized by our court and has been misunderstood.[264] It will be noted that a search of this nature, as an incident to a lawful arrest, is not restricted to any particular "thing" as was required in a search for contraband in the *Cofer* case,[265] but the officers may seize anything as evidence of a crime whether related to the crime being investigated or not.[266] But an officer may not seize and search a person on mere suspicion although at a later date it develops that there was a burglary and accused had stolen goods on his person.[267]

The right to search, in this case, however is limited and does not extend to the entire premises of the person arrested; it is not as extensive as a search under a search warrant which describes the entire property

254Id. §§ 1877, 2297.

255Millwood v. State, 198 Miss. 485, 23 So. 496 (1945).

256Smith v. Rankin County, 45 So.2d 592 (1950).

2574 Am. Jur. 47; 82 A.L.R. 782; 74 A.L.R. 1387; 32 A.L.R. 681; 51 A.L.R. 431; 74 A.L.R. 1398; 82 A.L.R. 784.

25811 Am. Jur. 1015.

259See, e.g., Harris v. State, 216 Miss. 895, 63 So.2d 396 (1953).

260See, e.g., Keel v. State, 176 Miss. 867, 169 So. 653 (1936).

261Bird v. State, 154 Miss. 493, 122 So. 539 (1929).

262Patton v. State, 203 Miss. 265, 33 So.2d 456 (1948).

263Craft v. State, 202 Miss. 43, 30 So.2d 414 (1947).

264Compare Brooks v. Wynn, 46 So.2d 97 with Toliver v. State, 133 Miss. 789, 98 So. 342 (1923).

265Cofer v. State, 152 Miss. 761, 118 So. 613 (1928).

266Harris v. U. S. 151 F.2d 837 (10th Cir. 1945); People v. Chaigles, 237 N.Y. 193, 142 N.E. 583 (1923).

267Acuna v. State, 54 So.2d 256 (1951).

to be searched.[268] The courts have held that such a search can only extend to "immediate presence," "immediate control," "immediate surroundings."[269]

Our statutes on arrest in Mississippi are declaratory of the common law rules[270] with the exception that under the common law rule it was the duty of all officers and the right of all citizens to arrest insane persons.[271] The peace officers have all the powers to arrest granted under the statutes,[272] and also the powers of peace offices under the common law.[273]

It may be said that the right of an officer to make an arrest is divided into two catagories: (A) misdemeanor and (B) felony.[274] The right to arrest for a misdemeanor is limited to crimes committed in the "presence of the officer" or a threatened breach of the peace,[275] and the officer is quilty of a crime if he fails to perform such a duty;[276] and such an arrest must be made as quickly after the commission of the crime as circumstances will permit.[277]

A. *Misdemeanor*

The right to search as an incident to the arrest of one charged with a misdemeanor, depends upon the "probable cause" for the arrest of a crime committed "in the presence" of the officer,[278] and a search in violation of the rule of "probable cause" is a violation of the defendant's fundamental right.[279]

It would appear that an officer would know when a crime is being committed "in his presence," but since he can only know through one of his senses,[280] he could be in error; therefore, the "probable cause" must be determined by the court.[281] The officer is not the final judge of what constitutes "probable cause."[282] The officer could be in error from a scientific point of view, in which event fact would be accepted over his opinion gained by his sense taste.[283]

An officer will not be permitted to testity about facts gained through one of his senses (smell) at a time when he was trespassing.[284] On the

[268]King v. State, 147 Miss. 31, 113 So. 173 (1927); Toliver v. State, 133 Miss. 789, 98 So. 342 (1923).
[269]47 Am. Jur. 19, at p. 515.
[270]Craft v. State, 202 Miss. 43, 30 So.2d 414 (1947).
[271]Forsythe v. Ivy, 162 Miss. 471, 130 So. 615 (1932).
[272]Millwood v. State, 198 Miss. 485, 23 So.2d 496 (1945).
[273]Martin v. State, 190 Miss. 32, 199 So. 98 (1940).
[274]Miss. Code Ann. § 2470 (1942).
[275]Id.
[276]Id. § 2297.
[277]Smith v. State, 87 So.2d 917 (1956).
[278]See, e.g., Pettis v. State, 209 Miss. 726, 48 So.2d 355 (1950).
[279]Myers v. State, 158 Miss. 554, 130 So. 741 (1930).
[280]Thomas v. State, 208 Miss. 264, 44 So.2d 194 (1950).
[281]King v. State, 147 Miss. 31, 113 So. 173 (1927).
[282]King v. State, supra note 281.
[283]Stein v. Adams, 23 So. 269 (1898).
[284]Hartfield v. State, 209 Miss. 787, 48 So.2d 507 (1950).

other hand, an officer may have probable cause for believing that a crime is being committed through his sense of smell at a time when he is not trespassing.[285]

There are several outstanding cases in Mississippi which should be brought to the attention of the reader with reference to "probable cause" of crime. There is one case in which it is not clear whether the witness was an officer or a private citizen but which demonstrates the impression one may gain through his sense, but which is not "legal probable cause." In this case a witness saw several men gathered around a stump from which they took a bottle. The men each drank from the bottle and laughed. The witness did not know what was in the bottle. He did not smell whiskey but he fervently believed the bottle contained "moonshine." The court held that his impression was "mere suspicion."[286] In another case an officer was informed that whiskey would be delivered at a certain place, and upon going to the place mentioned he saw men with kegs; he did not know what was in the kegs until after he arrested the defendant. The court held that there was not sufficient "probable cause" for arrest, and the search was illegal.[287]

Where an officer saw a negro going along the street looking suspicious, he commanded the negro to stop; the negro began to run and dropped a box. The officer examined the box and discovered whiskey. The court held that what he saw was not sufficient "probable cause" to arrest the defendant and the search was therefore illegal.[288] In another case where the officer was informed that a certain negro would arrive on a train with a suitcase full of whiskey, the officer rushed to the train and saw the negro get off the train. The negro, seeing the officers, left his suitcase on the train steps and the officer seized the suitcase and arrested the negro. The negro later told the officers that he had whiskey in the suitcase. The court held that there was not sufficient "probable cause" to make the arrest since the suitcase is not one of the "vehicles" mentioned in the statute commanding the officer to search on "information."[289]

On the other hand, where the officer was informed that whiskey will be delivered in a "vehicle," and upon going to the place, he smelled whiskey the court held there was sufficient "probable cause" for the arrest, and a search for a crime committed in his presence was legal.[290] In another case an officer saw a keg in an automobile, and upon asking what was in the keg, he was informed by the defendant that the keg contained "whiskey". It was held that the officer did have "probable cause" from

285Thomas v. State, 208 Miss. 264, 44 So.2d 194 (1950).
286Williams v. State, 98 So. 33 (1923).
287Patton v. State, 160 Miss. 274, 135 So. 352 (1931); Orick v. State, 140 Miss. 184, 105 So. 465 (1925).
288Butler v. State, 135 Miss. 885, 101 So. 193 (1924).
289Harris v. State, 209 Miss. 183, 46 So.2d 194 (1950).
290Harris v. State, 216 Miss. 895, 63 So.2d 396 (1953).

what he had heard to make the arrest and that the search was legal.[291] And in a case where an officer questioned the defendant about the contents of a sack in his hands, the defendant said it contained whiskey; the court held the officer had "probable cause" to make the arrest from what he had heard.[292] In a case where an officer saw a bottle protruding from a sack and the defendant took the bottle and broke it upon a brick "thereby disclosing its contents," the court held that the officer had "probable cause" from what he had seen.[293]

It has been said that a good test for determining the question of whether or not a crime is being committed "in the presence of the officer" is this: Could the officer testify as a witness at the time of the arrest, of his own knowledge, to sufficient facts which happened in his presence to make out a case against the defendant?[294]

Our court has undertaken to explain what is meant by the phrase, "in his presence or view," in a case in which a group of boys were charged with slipping into a picture show. The doorkeeper informed the officer that the boys "slipped in". The officer was not present and knew nothing about it except what the doorkeeper told him. The court held that the "officer must have direct personal knowledge through one of his senses that the act was the act of the accused," and the arrest of the boys was without "probable cause."[295]

There is an interesting case from Kentucky in which an officer heard screams of such a nature as to cause alarm. The officer went upon the property of the defendant and ran upstairs to a room where he discovered defendant beating his mistress. The officer arrested the defendant and the court held the crime was being committed in "the presence of the officer."[296]

It is evident, therefore, that an officer may go upon the real property of the defendant to make an arrest committed in "his presence or view" where "probable cause" is obtained through one of his senses.[297] The alleged misdemeanor must, however, be committed in his presence or view and an officer cannot trespass (although he finds whiskey) to arrest for a misdemeanor not committed in his presence, and his testimony will not be admitted;[298] nor will the officer's testimony be admitted if he trespasses in order to see a crime "committed in his presence or view".[299]

"Within his view," does not mean within his reach or immediate

[291]Williamson v. State, 140 Miss. 841, 106 So. 479 (1925).
[292]Johnson v. State, 179 Miss. 446, 176 So. 164 (1937).
[293]Baldwin v. State, 175 Miss. 316, 167 So. 61 (1936).
[294]Myers v. State, 158 Miss. 554, 130 So. 741 (1930). See Smith v. State, 160 Miss. 56, 133 So. 240 (1931).
[295]Kennington-Saenger v. Wicks, 168 Miss. 566, 151 So. 549 (1933).
[296]Dilger v. Commonwealth, 88 Ky. 550, 11 S. W. 651 (1889).
[297]Schillings v. State, 151 Miss. 361, 118 So. 137 (1928).
[298]Iupe v. State, 140 Miss. 279, 105 So. 520 (1925).
[299]Daniel v. McNeel, 217 Miss. 573, 64 So.2d 636 (1953).

presence but within such distance as to be recognizable by sight[300] or when his senses afford him knowledge that an offense is being committed "in his presence",[301] and may mean hearing as well as seeing.[302]

The officer must arrest the defendant after he witnesses a crime committed in his presence as soon after the commission of the crime as circumstances will permit, and on failure to do so, he cannot later arrest the defendant without a warrant.[303]

B. *Felony*

There is an entirely different rule on the right to search, growing out of the officers' duty to arrest for a charge of felony, in that the crime need not have been committed in the "presence and view of the officer."[304] The officer's duty[305] to make an arrest for felony without a warrant is divided into three distinct classes[306] as follows: (1) when a known person has committed a felony, although the crime was not committed in the presence of the officer; (2) when a known felony has been committed, and the officer has reasonable grounds to believe that the person arrested is the guilty person; and (3) when there is a charge (or notice)[307] supported by reasonable cause, that a felony has been committed and it is believed on reasonable grounds that the person arrested is the guilty person.

Sections 2470 and 2297 of the Mississippi Code of 1942 should be read together. It will be noted that in the later section wherein it is made a crime for the officer to fail to make an arrest, there appears the phrase, "or of which he has any notice," making it the duty of the officer to proceed in any case when this "notice" amounts to "probable cause." It should be noted that our court has held that a telephone conversation may furnish sufficient notice so as to amount to "probable cause,"[308] but a telephone conversation must give such facts as would amount to "probable cause;" otherwise, the arrest is illegal and the search illegal.[309]

When an officer is in possession of sufficient facts as to amount to probable cause, it becomes the duty of the officer to proceed to make an arrest for a charge of felony, and he may go on real property without a warrant or a search warrant for the purpose of making such arrest. He may destroy contraband and his evidence may be admitted in the trial.[310] The court has often held that the warrants are not necessary.[311] In a

300Kennington-Saenger v. Wicks, 168 Miss. 566, 151 So. 549 (1933).
301Bass v. State, 182 Md. 496. 35 A.2d 155 (1944).
302State v. Williams, 36 S. C. 493, 15 S. E. 554 (1892).
303Smith v. State, 87 So.2d 917 (1956).
304Miss. Code Ann. § 2470 (1942).
305Id. § 2297.
306Id. § 2470.
307Id. § 2297. Wheeler v. State, 219 Miss. 129, 63 So.2d 517 (1953).
308Parks v. State, 180 Miss. 763, 178 So. 473 (1938).
309Laster v. Chaney, 180 Miss. 110, 177 So. 524 (1937).
310Ingram v. State, 146 Miss. 303, 111 So. 362 (1927).
311Ingram v. State, supra note 310.

case in which the officers were informed that a certain doctor was committing incest with his step-daughter in a certain negro house, and entered the negro house and arrested the doctor, the court held that the arrest and search were proper and that the officer could testify as to what he saw.[312] Officers are not permitted to go on property and arrest on "mere suspicion"; they must have the right to arrest before going on the property.[313] A comparison should be made of the right of arrest for a felony and a misdemeanor.[314] The officer may not go back after the arrest and incarceration of accused and make a search.[315]

Since the law requires the officer to go on property to investigate a crime and to make an arrest, "when a known felony has been committed" and the officer has reasonable grounds to believe the person sought is the guilty person,[316] the officer may go upon the property and "immediate surroundings" of the defendant and search where the crime was committed,[317] and search the accused;[318] may see and seize contraband which is not connected with the crime for which he entered the property.[319] The officer may do all things he could do with a search warrant, within the immediate surroundings, but he cannot search beyond the "immediate presence."[320] He may, however, follow a bloody trial across property and on property of the accused.[321]

On a second or subsequent trip to the property of the defendant to investigate the crime, the officer must be armed with a valid search warrant; after the arrest and removal of the defendant, the officer cannot search without a valid search warrant;[322] because a second trip, after the arrest, is not an incident to an arrest.[323] Moreover, when the officers have a search warrant, after the defendant has been arrested, the warrant must comply with the law and describe the thing to be seized. A search warrant for intoxicating liquor will not permit the seizing of "shotgun shells" to be used as evidence in a murder case.[324] Where the defendant is arrested and taken just outside the house, but still on the premises, the officers may continue to search while on their first trip.[325]

312Love v. State, 142 Miss. 602, 107 So. 667 (1926).
313Branning v. State, 215 Miss. 223, 60 So.2d 633 (1952).
314Iupe v. State, 140 Miss. 279, 105 So. 520 (1925).
315Infra.
316Miss. Code Ann. § 2470 (1942).
317Davis v. State, 170 Miss. 78, 154 So. 340 (1934); Millette v. State, 167 Miss. 172, 148 So. 788 (1933); Monette v. Toney, 119 Miss. 846, 81 So. 593 (1919). Annot. 74 A.L.R. 1395; 82 A.L.R. 784 (1932).
318Lancaster v. State, 188 Miss. 374, 195 So. 320 (1940).
319See, e.g., Williams v. State, 216 Miss. 158, 61 So.2d 793 (1953).
320Page v. State, 208 Miss. 347, 44 So.2d 459, (1950).
321Leflore v. State, 197 Miss. 337, 22 So.2d 368 (1945).
322Martin v. State, 217 Miss. 506, 64 So.2d 629 (1953).
323Millette v. State, 167 Miss. 172, 148 So. 788 (1933).
324Cofer v. State, 152 Miss. 761, 118 So. 613 (1928).
325Cobb v. State, 83 So.2d 833 (1955).

The method of obtaining a search warrant for the search of evidence in connection with a crime will be discussed later.[326]

It is well at this point to remember that when an officer has a warrant for the arrest of a felon, he may search any house, whether it is the house of the defendant or of another, for the purpose of arresting the accused.[327]

XII. SEARCH FOR EVIDENCE OF CRIME WITH SEARCH WARRANT

We have seen heretofore that our courts have recognized that a search made by officers without a warrant after an arrest and after defendant has been incarcerated, is not a search incident to an arrest, and, therefore, such a search is void and the evidence obtained may not be introduced in the trial of the owner of the property over his objection. In other words, an officer may not make a second trip to the property of the accused property owner without obtaining a search warrant.

Under the common law, search and seizure was permitted not only for stolen goods and contraband but for evidence of crime and means of committing crime such as tools and weapons.[328] The United States Supreme Court, dealing with the question of obtaining search warrants for weapons and fruits of crime, held in 1921: "At the time the constitution was adopted, stolen or forfeited property or property liable for duties and concealed to avoid payment on them, excisable articles, and books required to be kept by law, counterfeit coins, burglar's tools and weapons, implements of gambling, might be searched for . . . and if found might be seized under search warrant lawfully applied for, issued and executed."[329]

The Congress, as late as June 15th, 1927, enacted into law a restatement of the common law rule on search and seizure, which recognizes the old rule that a search may be made for property, "when it has been used as a means of committing a felony and when the property is in the possession of persons who have the intent to use it as a means of committing a felony."[330]

Mississippi officers have from time to time attempted to secure evidence in a criminal case by obtaining a search warrant for contraband and, of course, the court refused to permit the introduction of such evidence, except when it was contraband.[331] There is a case where the of-

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326Infra.

327Miss. Code Ann. § 2472 (1942); Hughes v. State, 196 Miss. 282, 17 So.2d 444 (1944).

32847 Am. Jur. 511.

329Gouled v. U. S., 255 U. S. 298, 65 L. Ed. 647 (1920).

330See 18 U. S. C. § 612 (1952).

331Cofer v. State, 152 Miss. 761, 118 So. 613 (1928); Williams v. State, 216 Miss. 158, 61 So.2d 793 (1953).

ficers obtained a search warrant for the specific evidence sought and our court made no objection thereto except that the warrant did not follow the form set out in the statute, as the affidavit and search warrant used "suspect" instead of "has reason to believe and does believe." The court then said, "for that reason the search was illegal." In other words, had the affidavit and the warrant complied with the statute the search for a "bloody axe" would have been legal.[332] This case is also mentioned later in another case wherein a search was made for a "bloody blanket."[333] In another case wherein the charge was murder, the court held: "It was necessary to obtain a search warrant for evidence of incriminating nature."[334]

There are two instances of legislative enactments which indicate that the legislature intends for evidence to be obtained for use in criminal prosecution. The first is a section of the Code on fingerprinting defendants: "The sheriff . . . is hereby authorized and empowered to photograph any person or to have photographs made of fingerprints of any person . . . is further empowered to have photographs made of fingerprint impression upon any subject, or thing or of like evidence of crime."[335] This section has been overlooked by our court several times and in one case the court said, "The state failed to show that Brooks voluntarily submitted to an examination of his person . . . and a photograph thereof."[336]

The second instance is the re-enactment of section 2478, Mississippi Code of 1942, after the Supreme Court had held this section to be unconstitutional because it permitted the search for gambling "without a warrant."[337] The legislature re-enacted the law leaving out the words "without a warrant", meaning, of course, the legislature wanted the evidence if necessary "with a warrant."[338]

The question usually asked by an officer is what form of warrant is to be used in the search for evidence (a bloody axe). Since there is no case directly on this point, we can only assume that the search warrant used in the *Lancaster* case[339] is the proper one. We are aided in our assumption by the fact that this form is the form generally used under common law search in every instance, be it for stolen goods or evidence.[340] The form is the same form used in search for stolen goods.[341] The form

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332Lancaster v. State, 188 Miss. 374, 195 So. 320 (1940).
333Page v. State, 208 Miss. 347, 44 So.2d 459 (1950).
334Martin v. State, 217 Miss. 506, 64 So.2d 629 (1953).
335Miss. Code Ann. § 2610 (1942). See id. § 2611.
336Brooks v. State, 46 So.2d 95 (1950).
337Polk v. State, 167 Miss. 506, 142 So. 480 (1932).
338Miss. Code Ann. § 2478 (Supp. 1950).
339188 Miss. 374, 195 So. 320 (1940).
340McKinley, 19 Encyclopedia Pleading & Practice 324.
341Miss. Code Ann. §§ 2624, 2625 (1942).

should show that a crime has been committed and that the fruits of or the weapon used in crime is concealed in a designated place.[342]

XIII. CONTRABAND

Contraband is a compound word meaning "against the law and originally meant an ecclesiastical curse or taboo."[343] The modern meaning is, "things outlawed."[344] Under Mississippi law, contraband, or things outlawed, may be seized at any time by an officer, and in some cases may be destroyed.[345] The officer may not seize things which are not "per se contraband" unless they are particularly described in the search warrant;[346] nor search for contraband which is not "open to hand and eye" without a search warrant;[347] nor seize contraband if the officer is wrongfully on the defendant's property.[348]

There are many things under "ban" or "outlawed" under the laws of the State of Mississippi, and although it is against the law to possess them, not all of them are subject to destruction by the officers. The following are: stolen goods;[349] intoxicating liquors;[350] alcoholic preparations;[351] vehicles used to violate liquor law;[352] gambling devices and money;[353] punch boards and pinball machines;[354] deadly weapons;[355] burglary tools;[356] illegal drugs;[357] diseased animals;[358] combustible and dangerous material;[359] fish and game equipment;[360] obscene literature;[361] untaxed tobacco; adulterated food;[362] nuisance to health on court order only;[363] beer and wines;[364] and whiskey stills.[365]

Under the general law, only such articles which can be used for no

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342Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200 (1814).
343Bouvier's Law Dictionary.
3449 Words & Phrases 206.
345See Peebles v. State, 57 So.2d 263 (1952).
346Cofer v. State, 152 Miss. 761, 118 So. 613 (1928).
347Castillow v. State, 135 So. 205 (1931).
348Iupe v. State, 140 Miss. 279, 105 So. 520 (1925).
349Miss. Code Ann. § 2576 (1942).
350Id.§§ 2614, 2616, 2617.
351Id. § 2260.
352Id. § 2615.
353Id. § 2196.
354Id. § 2047 as amended (1950).
355Id. § 2080.
356Id. § 2044 as amended.
357Id. §§ 2282, 2289, 6826, 6838, 7108.
358Id. §§ 2005, 4835.
359Id. § 5702.
360Id. § 5865.
361Id. §§ 2280, 2288, 2289.
362Id. §§ 7108, 7122.
363Id. § 7037.
364Id. § 10208 as amended (1956).
365Id. § 2618.

legitimate purpose may be seized without a court order.[366] This does not cover articles such as counterfeit coins[367] and game tables.[368]

XIV. TRIAL

The trial for the possession of contraband is not begun with the issuance of a search warrant and its return because a search warrant is an "ancillary writ," and not an "information or indictment" as is required by section 26, Constitution of 1890 before a trial can be had in the courts. Before a trial can be had charging the defendant with the unlawful possession of contraband obtained by a search warrant, an affidavit must be lodged with the justice court, or an indictment must have been returned by a grand jury in the circuit court.[369] Moreover, the affidavit or the indictment must conclude with the phrase, "against the peace and dignity of the State of Mississippi."[370] A search warrant may be based on two or more grounds for search, in the disjunctive,[371] while upon a trial of a case a defendant may not be tried on two or more charges in the disjunctive.[372] A search and seizure is therefore a preparation for a prosecution and not the beginning of a prosecution.

Before testimony can be heard as to what was discovered by a search of a citizen's property, the state must offer the affidavit and search warrant in evidence, or show their loss or destruction,[373] and in the event the affidavit or warrant is lost or destroyed then its contents must be shown.[374]

The federal courts have adopted the rule that evidence wrongfully obtained by illegal search and seizure is not admissible. But most states hold to the rule that any evidence is admissible in the trial of crime, without regard as to how it is obtained.[375] Mississippi follows the rule adopted in the federal jurisdiction.[376]

There is one case called an "unusual case" by our Supreme Court in which there were no objections made by the attorney for the defendant. The court said, "If objections had been made to questions pointed out above and *such objections had been overruled,* a reversal would be obvious . . . however, the state procured a conviction on such evidence which was inadmissible because it was obtained in violation of constitutional and fundamental rights."

The court assumed there was no search warrant and assumed there

366 47 Am. Jur. 512.
367 Miss. Code Ann. § 2179 (1942).
368 Id. § 2192.
369 Miss. Code Ann. §§ 1834, 2440 (1942).
370 Miss. Const. § 169.
371 Banks v. City of Jackson, 152 Miss. 844, 120 So. 209 (1929).
372 McGraw v. State, 157 Miss. 675, 128 So. 875 (1930).
373 Jefferson v. State, 207 Miss. 576, 42 So.2d 772 (1949).
374 Pickle v. State, 151 Miss. 549, 118 So. 625 (1928).
375 20 Am. Jur. 354, 356.
376 Tucker v. State, 128 Miss. 211, 90 So. 845 (1922).

was no legal search because no search warrant was offered in evidence and no objection was made to the testimony offered without the introduction of the search warrant.[377]

The court seemed to ignore and pass lightly over the many cases, not only in Mississippi but throughout the nation that hold an objection must be made to the testimony when offered or otherwise, the "fundamental and constitutional rights are waived."[378]

It has been the rule in this state for many years that where no objection is made to the evidence in the lower court, the question cannot be raised in the supreme court.[379] It is insufficient to wait until the evidence has been made and then make a motion to exclude it,[380] for it is then too late. In one case the supreme court used the following language: "No objection was made on the ground that the affidavit and search warrant were not produced. This being true, the failure of the state to introduce the affidavit and warrant was waived and cannot now be assigned as error."[381] Again, the court said, "The affidavit . . . does not allege 'and does believe.' Had the attention of the court been called to this omission the affidavit would have probably been held to be inadmissible on that ground, but the evidence was not objected to on that ground. The objection cannot be considered here."[382] In still another case the court said, "No objection having been made in the lower court it cannot be considered here, although defendant had no attorney."[383]

In discussing the "fundamental law and sacred rights," of an accused, under section 26, Miss. Constitution of 1890 with reference to the rule against self-incrimination, the court said, "The rule of self-incrimination is not an absolute immunity, but it is simply a privilege, though sacred and important, of which the defendant may avail himself, or not, at his pleasure. It may be and is waived unless specially claimed."[384] Again, the court said, "the Constitutional immunity (on rule of self-incrimination) is a privilege and must be claimed by the accused, or he waives it."[385]

Our court has held in several cases that the trial judge should reject incompetent testimony on his own motion,[386] but has never held that it was a reversible error if the court fails so to do.

The admissibility of evidence gained by a search is for the determination of the court and not the jury. The reasonableness of a search, both at common law and under our statutory law, is not determined by the

[377]Brooks v. State, 209 Miss. 150, 46 So.2d 94 (1950).
[378]See, e.g., Parkinson v. State, 145 Miss. 237, 110 So. 513 (1926).
[379]Boutwell v. State, 144 So. 479 (1932).
[380]Boutwell v. State, 165 Miss. 16, 144 So. 479 (1932).
[381]Carr v. State, 187 Miss. 535, 192 So. 569 (1940).
[382]Cox v. State, 146 Miss. 685, 112 So. 479 (1929).
[383]Johnson v. State, 220 Miss. 452, 70 So.2d 926 (1954).
[384]Brown v. State, 173 Miss. 542, 161 So. 465 (1935).

presence or absence of a search warrant. It is a judicial question to be determined by the court in each case, taking into consideration the place searched, the thing seized, the purpose, and the circumstances under which the search and seizure was made and the presence or absence of probable cause.[387]

After the court has determined there was probable cause, upon a preliminary hearing, the evidence then goes to the jury for its determination of the facts on the issue of guilt.[388] There is one case, however, that holds, "it was a question of fact as to whether the houses correspond to the description in the search warrant."[389]

Probable cause has always been a judicial question and an officer undertaking to act upon "probable cause" in making an arrest and search must not only have information that causes him to "believe," but he must satisfy the judicial mind as to "probable cause."[390]

The court cannot reserve its ruling on the admissibility of evidence of a search but must pass upon the evidence before it is permitted to go to the jury.[391]

We have already seen that the legality of the issuance of a search warrant is based on whether or not there was probable cause for the search, and now the final test as to the admissibility of the evidence is whether or not the officer or agent of the state was *trespassing* at the time of the search and seizure.[392] The court has gone so far as to say that the officer's testimony is competent only if obtained by a legal search warrant.[393]

An officer may testify about all that he learns through one of his senses provided he is not trespassing at the time he makes the discovery.[394] He may testify to all that he *sees* because the eye cannot trespass.[395] He may see a bloody trail;[396] a bottle protruding from defendant's pocket;[397] kegs in an automobile;[398] cans;[399] jugs thrown from an automobile;[400] blanket in an automobile;[401] absence of license tag on auto-

385State v. Milam, 210 Miss. 13, 48 So.2d 594 (1950).
386Smith v. City of Louisville, 215 Miss. 213, 60 So.2d 610 (1952).
387Moore v. State, 138 Miss. 116, 103 So. 483 (1925).
388Ingram v. State, 146 Miss. 303, 111 So. 362 (1927).
389Collins v. State, 178 Miss. 548, 174 So. 61 (1937).
390King v. State, 147 Miss. 31, 113 So. 173 (1927).
391Holmes v. State, 146 Miss. 351, 111 So. 860 (1927).
392Brooks v. Wynn, 46 So.2d 97 (1950); Martin v. State, 190 Miss. 898, 2 So.2d 143 (1941).
393Cox v. State, 146 Miss. 685, 112 So. 479 (1929).
394Jefferson v. State, 42 So.2d 772 (1949).
395Bone v. State, 207 Miss. 868, 43 So.2d 571 (1949).
396Leflore v. State, 197 Miss. 337, 22 So.2d 368 (1945).
397Baldwin v. State, 175 Miss. 316, 167 So. 61 (1936).
398Williamson v. State, 140 Miss. 481, 105 So. 479 (1925).
399Holmes v. State, 146 Miss. 351, 111 So. 860 (1927).
400Goodman v. State, 158 Miss. 269, 130 So. 285 (1930).
401Bone v. State, 207 Miss. 868, 43 So.2d 571 (1949).

mobile;[402] cattle in a truck;[403] jugs being loaded into an automobile;[404] a pistol.[405] And the use of a flashlight by the officer in the aid of seeing is not trespass.[406]

The officer may testify as to what he saw at the scene of the crime, for example: the condition of the body of the deceased, and the physical surroundings;[407] mutilated body, and blood on bathroom floor;[408] pieces of human flesh;[409] mutilated body of dead child;[410] but not such articles as pocket knives, if the officer is wrongfully on the property of the accused. [411] He may testify that he saw: blood on the floor and a bloody broken broom;[412] an ice pick and tooth-ache medicine.[413]

An officer may observe action going on and testify as to what he saw at a time when he was not trespassing. He may see: wife pouring out whiskey;[414] a man lying by a still in operation;[415] a boy running with a paper sack in his hands;[416] a girl putting a paper bag under her coat;[417] accused emptying liquor from jugs;[418] and accused unloading jugs and breaking a jug.[419]

An officer may testify as to what he heard at a time when he was not trespassing; and in one case the court held that a statement made by the accused at a time when the officer was trespassing could be admitted.[420] He can testify that he heard a woman say, "here they come;"[421] accused say, "my boy, my bag, and my whiskey;"[422] "Maybelle said it was her whiskey;"[423] an accused say, "I did not know it (a trap door) was there;"[424] and, "I killed him,now hang me."[425]

An officer may testify as to what he smelled at a time when he was

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[402]Brown v. State, 179 Miss. 696, 176 So. 721 (1937).
[403]Huggings v. State, 209 Miss. 552, 47 So.2d 852 (1950).
[404]Harris v. State, 216 Miss. 895, 63 So.2d 396 (1953).
[405]Daniels v. Gulfport, 146 Miss. 517, 112 So. 686 (1927).
[406]Goode v. State, 158 Miss. 616, 131 So. 106 (1930).
[407]Fisher v. State, 150 Miss. 206, 116 So. 746 (1928).
[408]Dickens v. State, 208 Miss. 69, 43 So.2d 366 (1949).
[409]Keeton v. State, 175 Miss. 631, 167 So. 68 (1936).
[410]Hancock v. State, 209 Miss. 523, 47 So.2d 833 (1950).
[411]Warren v. State, 174 Miss. 63, 164 So. 234 (1935).
[412]Page v. State, 208 Miss. 347, 44 So.2d 459 (1950).
[413]Cooper v. State, 194 Miss. 592, 11 So.2d 207 (1942).
[414]Cox v. State, 146 Miss. 685, 112 So. 476 (1927).
[415]Yancey v. State, 202 Miss. 662, 32 So.2d 151 (1947).
[416]West v. State, 42 So.2d 751 (1949).
[417]Quick v. State, 192 Miss. 789, 7 So.2d 887 (1942).
[418]Goodman v. State, 158 Miss. 269, 130 So. 285 (1930).
[419]Harris v. State, 216 Miss. 895, 63 So.2d 396 (1953).
[420]Quan v. State, 185 Miss. 513, 188 So. 568 (1939); Compare Cox v. State, 146 Miss. 685, 112 So. 479 (1927).
[421]Quick v. State, 192 Miss. 789, 7 So.2d 887 (1942).
[422]Qest v. State, 42 So.2d 751 (1949).
[423]Collins v. State, 178 Miss. 548, 174 So. 61 (1937).
[424]Goss v. State, 187 Miss. 188, 192 So. 494 (1940).
[425]Harmon v. State, 168 Miss. 417, 150 So. 904 (1933).

not trespassing. He may testify that he smelled: home brew;[426] whiskey;[427] whiskey in truck;[428] whiskey from broken jug.[429] But an officer's testimony that he smelled something sour is not sufficient;[430] nor can he testify that he smelled whiskey after he had wrongfully entered the property of the defendant.[431]

An officer may testify what he *tasted* at a time when he was not trespassing, but where his taste conflicts with an actual chemical analysis, the analysis will govern.[432]

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[426]Smith v. State, 198 Miss. 788, 24 So.2d 85 (1945).
[427]See, e.g., Copeland v. State, 202 Miss. 58, 30 So.2d 509 (1947).
[428]Bradley v. State, 209 Miss. 750, 48 So.2d 365 (1950).
[429]Harris v. State, 216 Miss. 895, 63 So.2d 396 (1953).
[430]Cook v. State, 94 So. 161 (1922).
[431]Hartfield v. State, 209 Miss. 787, 48 So.2d 507 (1950).
[432]Stein v. Adams, 23 So. 269 (1898).

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STUDENT COMMENTS

IMPLIED WARRANTIES OF REASONABLE FITNESS IN MISSISSIPPI

Purpose of Comment

The purpose of this Comment is to examine the common law in Mississippi dealing with the implied warranty of reasonable fitness where goods have been supplied under a sale or a contract to sell. In those jurisdictions where the *Uniform Sales Act* is in effect certain specified implied warranties become a part of the contract of sale by virtue of the statute.[1] Mississippi, however, has no such act, and this Comment therefore is primarily concerned with the question of when the Mississippi courts will impose upon the seller the implied warranty of reasonable fitness.

I. Introduction

A. *Express and Implied Warranties*

The term "warranty" has been defined by courts and legal writers in many ways, moving Professor Williston to observe that "there is no more troublesome word in the law. . . ."[2] Professor Waite defines a warranty as "a representation concerning goods sold, made by the seller or judicially assumed to have been made by him, for any inaccuracy in which the seller will be held liable."[3] Professor Vold offers this definition: "A seller's warranty in connection with a contract to sell or a sale of goods is an obligation, incidental to the transaction, that the seller shall be answerable for various matters relating to the goods. . . . The warranty obligation may . . . be either promissory in its nature, or independently imposed by law, or both."[4]

From these definitions it will be seen that there are two basic types of warranty obligations. The courts traditionally have denominated them as express warranties and implied warranties. The term "express warranty" often is used to include both warranties derived from express promises and warranties imposed by law because of express representations.[5] Express warranties, however, are not the concern of this discussion and will not further be examined herein.

As used in this Comment the term "implied warranties" means those warranties independently imposed by law because of tacit representations or because of broader considerations of policy.[6] The obligation is said to be analogous to quasi contractual or to tort obilgation.[7] Although

[1]Deere & Webber Co. v. Moch, 71 N.D. 649, 3 N.W.2d 471 (1942); 46 Am. Jur., Sales § 332 (1943). See Uniform Sales Act § 15.

[2]1 Williston, Sales § 181 (2d ed. 1924).

[3]Waite, Sales 190 (2d ed. 1938) .

[4]Vold, Sales § 140 (1931).

[5]Ibid.

[6]Professor Waite points out that from a lexicographical standpoint the court is *inferring,* rather than *implying,* a warranty when a so-called implied warranty obligation is imposed on the seller. It should be understood that in imposing an implied warranty a court is not construing a contract. See Waite, Sales 214 (2d ed. 1938).

[7]Vold, Sales § 140 (1931).

it is enforced under the form of a contract for the sake of convenience,[8] it does not rest upon the intention of the seller.[9] The implied warranty obligation is imposed "to promote high standards in business and to discourage sharp dealings;"[10] "so called implied warranties are injected into the law of contracts to hold vendors to a course of fair dealings."[11]

B. *Contractual Disclaimers of Warranty*

While the fact that a contract of sale is in writing does not necessarily exclude warranties implied by law,[12] a warranty will not be implied in conflict with the express terms of an agreement of sale whether written or oral. The seller may expressly prevent the implication or inference of any warranties on his part.[13]

In *Industrial Finance Corp. v. Wheat*[14] the Mississippi Court held that the following provision in a written contract for the sale of an automobile excluded any implied warranty of quality:

> "This agreement constitutes the entire contract and no waivers or modification shall be valid unless written upon or attached to this contract, and said motor vehicle is accepted without any express or implied warranties unless expressly contained herein."[15]

C. *Opportunity to inspect*

Ordinarily, where the buyer has an opportunity to inspect goods, no warranty will be implied as to defects which the examination ought to disclose, for the basis of implied warranty obligation is the *justifiable* reliance of the buyer upon the seller's judgment.[16] The Mississippi Supreme Court intimated in *Bellville Supply Co. v. Dacey*[17] that there is no implied warranty of quality[18] in a present executed sale of an existing article then open to examination and inspection by the purchaser. Presumably this is limited to the situation where the defect ought to be disclosed by the examination – *i.e.,* is not latent.

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[8]Hoe v. Sanborn, 21 N.Y. 552, 78 Am. Dec. 163 (1860). But see Biedenharn Candy Co. v. Moore, 184 Miss. 721, 186 So. 628 (1939), an action on the implied warranty of fitness for human consumption, where the court said: "What we have here . . . is a breach of the appellant's contract—an implied warranty—that the contents of the bottle purchased by the appellee were wholesome. . . ."

[9]Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790 (1927).

[10]Ibid.

[11]Lee v. Cohort, 57 S.D. 387, 232 N.W. 900 (1930).

[12]McDonald v. Sanders, 103 Fla. 93, 137 So. 122 (1931). Uniform Sales Act § 15 (6) is essentially a codification of this common law rule.

[13]Hopkinsville Motor Co. v. Massie, 228 Ky. 569, 15 S.W.2d 423 (1929). Uniform Sales Act § 71 codifies this rule. Some courts have held that a mere statement that the writing expresses the whole agreement of the parties, without specifically repudiating additional implications, will not preclude a finding of implied warranties. Hardy v. General Motors Acceptance Corp., 38 Ga. App. 463, 144 S.E. 327 (1928). Generally, courts appear reluctant to exclude implied warranties.

[14]142 Miss. 536, 107 So. 382 (1926).

[15]Id. at 540, 170 So. at 382.

[16]White v. Oakes, 88 Me. 367, 34 Atl. 175 (1896); Christenberry v. Saik, 191 Miss. 148, 2 So.2d 142 (1941). See 1 Williston, Sales § 234 (2d ed. 1924); Uniform Sales Act § 15 (3).

[17]141 Miss. 569, 106 So. 818 (1926) (dictum). In this case the defect in the Chrysler automobile in question was presumed by the court to be latent, thus making it incumbent upon the plaintiff, who was suing the dealer for breach of implied warranty to show that "the seller knew the buyer did not rely on his own judgment [in accepting the articles] but on that of the seller, who knew or might have known the existence of the defects." In short, it appears that the plaintiff failed to satisfy

D. *Caveat Emptor*

The doctrine of *caveat emptor* is said to apply in the sale of personal property.[19] In an early Mississippi case frequently cited as authority by the Mississippi Supreme Court it was said:

> "The general rule is that the purchaser [of chattels] buys at his own peril, *caveat emptor,* unless the seller either gives an express warranty or unless the law imply a warranty from the circumstances of the case or the nature of the thing sold. . . . There is certainly a tendency in the modern cases to enlarge the responsibility of the seller, and to extend the doctrine of implied warranty. . . . Still the general rule is as before stated, and every deviation from it, must be regarded as merely an exception."[20]

From the foregoing quotation it will be seen that in those jurisdictions where implied warranties are still determined by common law, the question is always present: "In what cases is . . . a warranty implied and in what cases does the old maxim of *caveat emptor* still apply?"[21] The question is a largely academic one, however, for the numerous exceptions which have been engrafted onto the general rule have made the doctrine of *caveat emptor* of little practical importance.[22]

II. The Implied Warranty of Reasonable Fitness

A. *Scope of the Warranty*

The implied warranty of reasonable fitness is variously termed "an implied warranty of fitness for a particular purpose"[23] or "an implied warranty of suitability."[24] Regardless of the label used, the rule generally is stated to be that where the buyer orders goods to be supplied for a particular purpose communicated to the seller, and trusts to or relies upon the judgment or experience of the seller to select goods which shall be applicable to and suitable for that purpose, there is an implied warranty that they shall be reasonably fit therefor.[25]

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the court that he had, with the seller's knowledge, *relied* on the judgment of the seller instead of his own. In stressing the plaintiff's seeming reliance on his own judgment the court referred to Orgill Bros. & Co. v. Everett, 138 Miss. 213, 103 So. 82 (1925), saying: "The sale there . . . was, as here, of an article by its well-established trade-name." Apparently the court felt that the buyer made the purchase of the automobile in reliance on the Chrysler trade-name, rather than in reliance on the judgment of the seller; accord, Gerard Motor Co. v. McEachern, 150 Miss. 437, 116 So. 816 (1928).

[18]The term "implied warranty of quality" is generally used as a generic term that encompasses the implied warranty of merchantability and the implied warranty of fitness. It is used in that generic sense throughout this Comment.

[19]Otts v. Alderson, 10 S. & M. 476 (Miss. 1848).

[20]Otts v. Alderson, supra note 19.

[21]1 Williston, Sales § 228 (2d ed. 1924).

[22]See Waite, Sales 228 (2d ed. 1938).

[23]1 Williston, Sales § 235 (2d ed. 1924); 46 Am. Jur., Sales § 346 (1943).

[24]Vold, Sales § 147 (1931). Uniform Sales Act § 15 lists the implied warranty of reasonable fitness, along with the implied warranty of merchantability, under the heading, "Implied Warranties of Quality."

[25]Dushane v. Benedict, 120 U.S. 630 (1887); F. W. Woolworth Co. v. Wilson, 74 F.2d 439, 98 A.L.R. 681 (5th Cir. 1934); McCaa v. Elam Drug Co., 114 Ala. 74, 21 So. 479 (1897); Smith v. Burdine's, Inc., 144 Fla. 500, 198 So. 223 (1940); cf. Missouri Bag Co. v. Chemical Delinting Co., 214 Miss. 13, 58 So.2d 71 (1952); Christenberry v. Saik, 191 Miss. 148, 2 So.2d 142 (1941); Otts v. Alderson, 10 S. & M. 476 (Miss. 1848). See Uniform Sales Act § 15 (1), which codifies the foregoing rule, except that the Sales Act, in derogation of the general common law rule, provides that § 15 (1) is to apply "whether the seller . . . be the grower or manufacturer or not. . . ."

In Mississippi this rule is said to apply only where the seller is the manufacturer.[26] It should be pointed out, however, that the Mississippi Court makes one notable exception to the foregoing limitation;[27] and that exception has practical effect of removing the limitation under certain conditions.[28]

Frequently the warranty of fitness will coincide with the warranty of merchantability.[29] Where this occurs, if the goods are not reasonably fit for general purpose for which they are manufactured, they also will not be merchantable.[30] This overlap may not occur where the buyer expresses to the seller in detail the specific purpose for which the article is to be used; in such a case, if the buyer justifiably relies on the seller's judgment, the seller's selection of articles in filling the order for the more narrowly defined purpose gives rise to an implied warranty of fitness for that particular purpose.[31]

If the seller is not informed of the buyer's purpose there can be no warranty of fitness for that purpose,[32] but the buyer may communicate his purpose to the seller merely by calling for goods of a certain kind. For example, where the buyer purchases cabbages from a grocer, it is usually a foregone conclusion that the cabbages are being purchased for human consumption, and the very nature of the bargain should indicate to the seller the purpose for which the cabbages were being purchased. Under circumstances such as these the fact that the seller supplies the articles constitutes a tacit representation that they are reasonably fit for the general purpose for which they are intended.[33]

"Reasonable fitness" does not mean perfection, or that the article is the best of its kind,[34] and where the goods of machinery sold are second-hand the general rule is that there is no implied warranty.[35]

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[26]See Watts v. Adair, 211 Miss. 777, 52 So.2d 649 (1951). The term "manufacturer" is broadly used to mean all sellers who produce the article which they sell; "thus a grower of plants or seeds or crops and one who breeds horses or cattle are included." 1 Williston, Sales § 240 (2d ed. 1924).

[27]See note 55 infra.

[28]This point is discussed later in the text in the section entitled, D. *Where the Seller is a Dealer.*

[29]"Warranty of merchantability" was discussed in Otts v. Alderson, 10 S. & M. 476 (Miss. 1848), where it was said that "there is a warranty that the articles are merchantable, when from their nature or situation at the time of the sale, an examination is impractical." The warranty obligation that goods shall be merchantable does not require that the goods shall be of the first quality or even that they shall be as good as the average of goods of the sort. The requirement of merchantability is that the goods with their defects known shall be salable as goods of the general kind which they were described or supposed to be when bought. See 1 Williston, Sales § 235 (2d ed. 1924).

[30]See Vold, Sales § 147 (1931); 1 Williston, Sales § 235 (2d ed. 1924).

[31]Ibid.

[32]Mark v. H. D. Williams Cooperage Co., 204 Mo. 242, 103 S.W. 20 (1907); cf. Bellville Supply Co. v. Dacey, 141 Miss. 569, 106 So. 818 (1926). See note 17 supra.

[33]Rinaldi v. Mohican, 225 N.Y. 70, 121 N.E. 471 (1918); cf. Allis-Chalmers Mfg. Co. v. Frank, 57 N.D. 295, 221 N.W. 75 (1928); Norvell-Wilder Hardware Co. v. McCamey, 290 S.W. 772 (Tex. Civ. App. 1927).

[34]Juvland v. Wood Bros. Thresher Co., 212 Minn. 310, 3 N.W.2d 772 (1942); Landers v. Safeway Stores, Inc., 172 Ore. 116, 139 P.2d 788 (1943).

[35]National Cotton Oil Co. v. Yong, 74 Ark. 144, 85 S.W. 92 (1905); Voos v. Lawrence, 200 Miss. 1, 26 So.2d 172 (1946); Williams v. McClain, 180 Miss. 6, 176 So. 717 (1937).

B. *Buyer's Reliance on Judgment of Seller*

In order for there to be an implied warranty of fitness for a particular purpose it must be shown that the buyer relied upon the skill or judgment of the seller;[36] this is a question of fact which is ordinarily to be determined by a jury under appropriate instructions.[37] Therefore, where a buyer enters into an executory contract for the purchase of goods *exactly* described, or makes an executed purchase of known, described, and definite goods, he cannot regard the seller as warranting that they are fit for any more special purpose than that which merchantable goods of the agreed description necessarily fulfill, for in such cases the buyer cannot be said to rely or depend upon the judgment, skill or experience of the seller.[38] "By exactly defining what he wants the buyer has exercised his own judgment instead of relying upon that of the seller."[39]

Where the buyer specifies a trade-name in making a purchase the court is likely to say that he defined what he wanted by means of the trade-name and hence was exercising his own judgment rather than relying upon that of the seller.[40] In *Orgill Bros. & Co. v. Everett*[41] the Mississippi Supreme Court dealt with this point. The buyer had purchased cotton scales of an established trade-name from a dealer who was not a manufacturer. The cotton scales proved to be inaccurate resulting in damage to the buyer. The court said:

> "The appellee purchased a known and definite article of a recognized and established make and trade-name, and the evidence fails to show that he relied on the judgment of the seller, and we do not think that, under the facts in this record, there was an implied warranty on the part of the dealer that the scales . . . were accurate."[42]

It should be pointed out, however, that the mere fact that an article sold is described in the contract by its trade-name does not necessarily make the sale a sale under or by a trade-name. Whether it is or not de-

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[36]Smith v. Burdine's, Inc., 144 Fla. 500, 198 So. 223 (1940); Walden v. Wheeler, 153 Ky. 181, 154 S.W. 1088 (1913); Gerard Motor Co. v. McEachern, 150 Miss. 437, 116 So. 816 (1928); Bellville Supply Co. v. Dacey, 141 Miss. 569, 106 So. 818 (1926); cf. Orgill Bros. & Co. v. Everett, 138 Miss. 213, 103 So. 82 (1925).

[37]Smith v. Burdine's Inc., supra note 36.

[38]Pullman's Palace Car Co. v. Metropolitan Street Ry. Co., 157 U.S. 94 (1894); Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790 (1927); Universal Motor Co. v. Snow, 149 Va. 690, 140 S.E. 653 (1927).

[39]1 Williston, Sales § 236 (2d ed. 1924). See Davis Calyx Drill Co. v. Mallory, 137 Fed. 332 (8th Cir. 1905); G. M. A. C. v. Jerry, 181 Ark. 771, 27 S.W.2d 997 (1930); Fairbanks, Morse & Co. v. Baskett, 98 Mo. App. 53, 71 S.W. 1113 (1903).

[40]Uniform Sales Act § 15 (4) expressly provides that "in case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose." Essentially this is a codification of the common law rule. See Iron Fireman Coal Stoker Co. v. Brown, 182 Minn. 399, 234 N.W. 685 (1931).

[41]138 Miss. 213, 103 So. 82 (1925).

[42]Id. at 221, 103 So. at 84.

pends upon the circumstances.[43] There remains one elementary question in all these cases: Did the buyer *rely* or depend upon the judgment, skill or experience of the seller?

C. *Where the Seller is a Manufacturer*

In the sale of a chattel by a manufacturer for a specific use, an implied warranty arises that the article is fit for the use intended.[44] Further, where a manufacturer or producer undertakes to furnish articles of his manufacture or produce in answer to an order, a warranty is implied against all latent defects.[45]

However, when machinery is ordered of a manufacturer to be made in accordance with plans and specifications furnished by the buyer, there is no implied warranty of fitness of the machinery for the intended purpose, arising from defects in the plans and specifications, even though the purpose for which the machine is intended is described to the seller.[46] Under these circumstances it cannot be said that the buyer relied upon the seller's judgment. The same result obtains as to fitness of material where the contract expressly specifies the material from which the article is to be made.[47] Where there is a partial description it is often difficult to determine when the seller's judgment has been justifiably relied upon and when the description is so definite as to preclude that assumption.[48]

The manufacturer or seller of food or other articles of personal property generally is not liable under an implied warranty to third persons who have no contractual relations with him.[49] In the words of a New York court, "The reason for this rule is that privity of contract does not exist between the seller and such third persons, and unless there be privity of contract there can be no implied warranty. The benefit of a warranty, either express or implied, does not run with a chattel on its resale. . . ."[50] In Mississippi an exception to this rule is made in regard to sales of food for human consumption.[51]

D. *Where the Seller is a Dealer*

The general rule is that a warranty of reasonable fitness will not be

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[43]Iron Fireman Coal Stoker Co. v. Brown, 182 Minn. 399, 234 N.W. 685 (1931). In holding that the sale in question was not a sale under a trade name as contemplated by Minnesota statute incorporating Uniform Sales Act § 15 (4), the court said: ". . .[W]here the buyer fully informs the seller of his particular needs, and the seller undertakes to select or supply an article suitable for the purpose involved . . . [an implied warranty of reasonable fitness arises] even though the article may be described in the contract of sale by its trade-name. . . ." It is submitted that in Mississippi, where Uniform Sales Act § 15 (4) does not obtain, a fortiori the same result would be reached as was reached in *Iron Fireman*.

[44]Downing v. Dearborn, 77 Me. 457, 1 Atl. 407 (1885); Watts v. Adair, 211 Miss. 777, 52 So.2d 649 (1951); Viking Refrigerators v. Farrell, 180 Miss. 181, 176 So. 910 (1937); Brown v. Murphee, 31 Miss. 91 (1856).

[45]Missouri Bag Co. v. Chemical Delinting Co., 214 Miss. 13, 58 So.2d 71 (1952); Orgill Bros. & Co. v. Everett, 138 Miss. 213, 103 So. 82 (1925); Otts v. Alderson, 10 S. & M. 476 (Miss. 1848); Hill & MacMillan v. Taylor, 304 Pa. 18, 155 Atl. 103 (1931).

[46]Hill & MacMillan v. Taylor, supra note 45.

[47]Rollins Engine Co. v. Eastern Forge Co., 73 N.H. 92, 59 Atl. 382 (1904).

[48]1 Williston, Sales § 236 (2d ed. 1924).

[49]Burkhardt v. Armour & Co., 115 Conn. 249, 161 Atl. 385 (1932); Chysky v. Drake Bros. Co., 235 N.Y. 468, 139 N.E. 576 (1923).

[50]Chysky v. Drake Bros. Co., supra note 49.

[51]This point is discussed later in the Comment text under the heading, A. *By Manufacturer, Packer or Bottler.*

implied where the seller is a dealer.[52] The reason for this is that the purchaser has the same knowledge and means of knowledge of an article as has the dealer.[53] In this jurisdiction the general rule obtains, and there is no implied warranty of fitness or quality of articles where there has been an executed sale by a dealer.[54] There is one notable exception to this rule in Mississippi, however, which may be stated in the following manner: An implied warranty of quality will be imposed on the seller who is neither a manufacturer nor producer where: (a) the defect in the article was *latent;* and (b) the article was purchased as a result of the buyer's *reliance* on the judgment of the seller; and (c) the seller *knew* that his judgment was being relied on; and (d) the seller *knew or might have known* of the existence of the defect.[55]

Careful examination of the four conditions of the foregoing exception shows that a warranty of fitness will be implied in Mississippi only where the seller had, or should have had, knowledge superior to that of the purchaser in regard to the article sold. Proving these four conditions would appear to be a formidable task.

III. Sale of Food for Human Consumption

A. *By Manufacturer, Packer, or Bottler*

The general rule has been seen to be that the manufacturer or seller of food, or other articles of personal property, is not liable to third persons under an implied waranty.[56] In Mississippi, however, the general rule does not obtain where foodstuffs for human consumption are involved. The Mississippi rule is that the implied warranty of a manufacturer, packer or bottler that his product is wholesome and fit for human

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[52]Reynolds v. General Electric Co., 141 Fed. 551 (8th Cir. 1905); McCaa v. Elam Drug Co., 114 Ala. 74, 21 So. 479 (1897); White v. Oakes, 88 Me. 367, 34 Atl. 175 (1896). Cf. Watts v. Adair, 211 Miss. 777, 52 So.2d 649 (1951); Kroger Grocery Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933).

[53]Reynolds v. General Electric Co., supra note 52. See Waite, Sales 219 (2d ed. 1938).

[54]Watts v. Adair, 211 Miss. 777, 52 So.2d 649 (1951).

[55]In Christenberry v. Saik, 191 Miss. 148, 2 So.2d 142 (1941), where the court refused to impose an implied warranty on a dealer, apparently on the ground that the buyer did not appear to have relied on the judgment of the seller, it was said: "In an executed sale of an existing article, of which the seller is not the manufacturer, nor is a dealer possessed of expert knowledge, either actual or pretended in regard thereto, there is no implied warranty in the absence of fraud on the part of the seller, *unless the defects complained of are latent, and the seller knows that the buyer has not relied on his own judgment, but on that of the seller, who knew or might have known of the existence of the defects.*" (Emphasis added.)

Careful analysis of the foregoing quotation leads to the conclusion expressed in the text of this Comment. In further support of this contention is the court's language in *Watts v. Adair,* supra note 54. In the *Watts* case, after declaring the general Mississippi rule that in an executed sale an implied waranty of fitness will be imposed only on a manufacturer, the court intimated the exception stated in the text of this Comment in these words: "There are not here involved such exceptional circumstances as . . . the existence of latent defects known actually or constructively by the seller alone."

[56]This point is discussed in the text under the heading, C. *Where the Seller is a Manufacturer.*

consumption inures to the ultimate consumer.[57]

As might be expected, the bulk of cases in Mississippi involving this point are the "Coca-Cola cases,"[58] which appear to have developed from *Jackson Coca-Cola Bottling Co. v. Chapman*.[59] Here the court said:

> "When a manufacturer maker, bottles, and sells to the retail trade, to be again sold to the general public, a beverage represented to be refreshing and harmless, he is under a legal duty to see to it that in the process of bottling no foreign substance shall be mixed with the beverage, which, if taken into the human stomach, will be injurious."[60]

Coca-Cola Bottling Works v. Lyons[61] established that the implied warranty goes to the ultimate consumer even though such person is not the purchaser of the article.

The plaintiff in *Curtiss Candy Co. v. Johnson*[62] purchased a candy bar in a Curtiss wrapper. The candy bar contained glass which injured the plaintiff. The court said:

> "Prima facie . . . when an article of food is sealed, and placed upon the market for human consumption, it is as though the consumer had bought directly from the manufacturer; and when, as ordinarily and usually, he places his name on the original package, and it is shown that the article was purchased as such, and is intact, then a case is made for the jury, and the jury are warranted in adopting the view that the article was manufactured as represented by the one manufacturing it, unless and until the manufacturer shall offer evidence to the contrary."[63]

The burden of proving a breach of implied warranty of fitness for human consumption is on the complaining party, but when the food reaches the ultimate consumer in the original package in which it was placed by the producer, there is a rebuttable presumption of fact that the food is then in the same condition as when placed therein by the producer. However, if the food does not reach the consumer in the original package in which it was placed by the producer for distribution by re-

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[57]Biedenharn Candy Co. v. Moore, 184 Miss. 721, 186 So. 628 (1939); Cudahy Packing Co. v. Baskin, 170 Miss. 834, 155 So. 217 (1934); Kroger Grocery Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933) (dictum); Curtis Candy Co. v. Johnson, 163 Miss. 426, 141 So. 763 (1932); Coca-Cola Bottling Works v. Simpson, 158 Miss. 390, 130 So. 479 (1930); Bufkin v. Grisham, 157 Miss. 746, 128 So. 563 (1930); Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927); Rainwater v. Hattiesburg Coca-Cola Bottling Co., 131 Miss. 315, 95 So. 444 (1923); Jackson Coca-Cola Bottling Co. v. Chapman, 106 Miss. 864, 64 So. 791 (1914). While a seller of provisions intended for human food impliedly warrants soundness, this is not true in the case of a sale of feed for animals. Dulaney v. Jones & Rogers, 100 Miss. 835, 57 So. 225 (1912).

[58]Biedenharn Candy Co. v. Moore, supra note 57; Coca-Cola Bottling Works of Greenwood v. Simpson, supra note 57; Bufkin v. Grisham. supra note 57; Coca-Cola Bottling Works v. Lyons, supra note 57; Rainwater v. Hattiesburg Coca-Cola Bottling Co., supra note 57; Jackson Coca-Cola Bottling Co. v. Chapman, supra note 57.

[59]106 Miss. 864, 64 So. 791 (1914).

[60]Id. at 869, 64 So. at 791. Justice Reed introduced the opinion of the Mississippi Supreme Court in these words: "A 'sma' mousie' caused the trouble in this case. The 'wee, sleekit, cow'rin,' tim'rous beastie' drowned in a bottle of coca-cola. How it happened is not told."

[61]145 Miss. 876, 111 So. 305 (1927). The plaintiff in Lyons had not purchased the tainted drink, but had received it as a gift from its purchaser.

[62]163 Miss. 426, 141 So. 763 (1932).

[63]Id. at 434, 141 So. at 764.

tailers, the plaintiff in an action against the producer has the burden of proving that the deleterious matter was in the food when it left the hands of the producer.[64] In *Cudahy Packing Co. v. Baskin*[65] the plaintiff purchased sausage taken from a large can which had previously been opened by the retailer. Plaintiff ate the sausage a short time thereafter and became ill. Her physician testified that the illness was caused by eating tainted food. The court refused to impose liability upon the defendant manufacturer for breach of the implied warranty of fitness, holding that the plaintiff had failed to meet the burden of showing that the deleterious matter was in the food when it left the hands of the manufacturer.

B. *By Retailer*

Mississippi's position in regard to the retail seller of food appears to be substantially the same as its position in regard to the ordinary dealer. The Mississippi rule is that a retail seller of canned food in the original package for immediate human consumption, purchased by the seller from a reliable packer without negligence and without reason to suspect defect, is not liable to the consumer on an implied warranty of fitness and purity.[66]

In *Kroger Grocery Co. v. Lewelling*[67] the defendant was a retail dealer in canned vegetables. Plaintiffs purchased from the defendant a can of tomatoes, the contents of which made the plaintiffs ill because of certain poisonous substances later found to have been embedded in the tomatoes. Plaintiffs sought to recover damages from the defendant retailer for their injuries upon the theory of an implied warranty. The Mississippi Court refused to impose an implied warranty obligation upon the retail seller, but affirmed the rule that the manufacturer, bottler, or packer of foods or beverages for immediate human consumption is bound by an implied waranty of wholesomeness running to the consumer. On this point the court said:

> "The [manufacturer's] liability is bottomed upon the protection of the public health; but that consideration can be conserved and at the same time the rule can be made to conform to what is equitable and just by placing the entire liability on the manufacturer or bottler or packer who prepares the food and seals it in containers, for there the canner has the opportunity and means, and therefore the duty, to insure that no noxious or injurious substances shall get into the cans—an opportunity and means which the retail dealer does not have, and for which he should not justly be charged."[68]

Once again it would appear that the Mississippi Court was influenced by the idea of equality of knowledge—equality of knowledge between the retail seller of goods in a sealed container and the purchaser. Presumably a different result would be reached if the food were not in a sealed

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[64]Cudahy Packing Co. v. Baskin, 170 Miss. 834, 155 So. 217 (1934).

[65]Ibid.

[66]Kroger Grocery Co. v. Lewelling, 165 Miss 71, 145 So. 726 (1933). The Mississippi rule is contrary to the rule declared by Professor Williston to represent the weight of authority, i.e., that a dealer is liable for selling unwholesome food even though in cans of a reputable brand. See 1 Williston, Sales § 242 and cases cited therein (2d ed. 1924).

[67]165 Miss. 71, 145 So. 726 (1933).

[68]Id. at 85, 145 So. at 727.

container and the case "involved such exceptional circumstances as . . . the existence of latent defects known actually or constructively by the seller alone."[69]

C. *By Restaurant Owner*

While there is a cleavage of opinion on this particular point among various jurisdictions,[70] the Mississippi rule is that the keeper of a public eating place warrants the fitness for human consumption of the food and drink which he serves for his guests.[71] Contrary results reached in some jurisdictions are based on the theory that the supplying of food to a guest for immediate consumption by the keeper of a restaurant or inn does not constitute a sale, but is simply a service.[72] In *Sartin v. Blackwell* the Mississippi Supreme Court rejected this approach and adopted the following quotation as representing their views on the matter:

> " 'The basis of implied warranty is justifiable reliance on the judgment or skill of the warrantor. . . . A sale is not the only transaction in which a warranty may be implied.' 2d Ed., Williston on Sales, vol. 1, Sec. 242b. With this we agree."[73]

IV. Remedies of the Buyer

In many instances the injured buyer will have the choice of either bringing a tort action against the seller on the theory of negligence or suing him for breach of implied warranty of quality. Needless to say, it will sometimes be difficult to prove negligence, even where the court shows a predilection for the doctrine of res ipsa loquitur.[74] Therefore, it often will be more desirable for the injured buyer to bring his action for breach of implied warranty of quality.

In Mississippi, where the seller has breached an implied warranty of quality[75] the buyer has the following remedies:[76] (1) He may return the goods to the seller and rescind the contract;[77] (2) he may accept the goods, thereby affirming the contract, and recover damages for breach of warranty; (3) he may recoup the same in an action for the purchase price.

If the buyer attempts to recover damages the burden of proof is on him to show that the *seller* breached his implied warranty of quality.[78]

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[69]See note 55 supra.

[70]See 1 Williston, Sales § 242b (2d ed. 1924).

[71]Sartain v. Blackwell, 200 Miss. 579, 28 So.2d 222 (1947).

[72]See Sartain v. Blackwell, supra note 71.

[73]Id. at 28 So.2d at 223.

[74]See Blount v. Houston Coca-Cola Bottling Co., 184 Miss. 69, 185 So. 241 (1939), where the buyer of a Coca-Cola in which was found "a part of a mouse or bird" brought a tort action for damages against the defendant bottler on the theory of negligence. The court said: "The doctrine of res ipsa loquitur applies in such a case." Application of this doctrine may send the case to the jury, but there is always the outside chance that the jury will find that the manufacturer or bottler was not negligent.

[75]The term "implied warranty of quality" is used here to include the implied warranty of merchantability and the implied warranty of reasonable fitness.

[76]Missouri Bag Co. v. Chemical Delinting Co., 214 Miss. 13, 58 So.2d 71 (1942).

[77]Cf. J. B. Colt Co. v. Mazingo, 141 Miss. 402, 106 So. 533 (1926). This case involved an express, rather than an implied warranty, but the result would have been the same had an implied warranty been involved. Here the court further held that an offer to return the goods, in order to constitute a rescission of the contract, must be made within a reasonable time after the discovery by the purchaser of the defects therein; and if such offer is declined by the seller, the goods must not thereafter be appropriated by the purchser to his own use.

[78]Cudahy Packing Co. v. Baskin, 170 Miss. 834, 155 So. 217 (1934).

In an action for damages against a *manufacturer of food* for breach of implied warranty of fitness for human consumption a prima facie case is made by the plaintiff if he proves:[79] (a) that he purchased food that was boxed, canned or packed by the manufacturer, with his name thereon, so that it could not be tampered with or examined before coming into the hands of the buyer; (b) that a foreign, deleterious substance was in the food when the box, can or package was opened; and (c) that from the eating of the tainted food the plaintiff suffered injury.

Of course a person seeking to recover damages caused by breach of implied warranty cannot recover damages which are proximately caused by his own negligence in using the defective articles; he can only recover such damages as he could not have avoided by the exercise of reasonable diligence, and he is required to make reasonable effort to protect himself from loss.[80]

Acceptance of goods under an executory contract with knowledge of defects making the goods unmerchantable is not as a matter of law an acceptance in full satisfaction or waiver of the seller's warranty that the goods are merchantable; hence the buyer can still recoup in this situation where the seller brings an action for the purchase price.[81] Presumably this would hold true where the seller had breached an implied warranty of fitness.

Where the buyer seeks to recoup damages alleged to have been sustained as the result of a breach of warranty of quality he must not only show with fair and reasonable certainty that the damages sought to be recouped are the direct, natural and proximate result of the breach of warranty, but the purchaser must also prove his damages with reasonable certainty.[82]

Conclusion

In conclusion it is submitted that the Mississippi rule allowing the ultimate consumer of food to bring an action for breach of implied warranty of fitness for human consumption directly against the manufacturer, producer or bottler is a sound and reasonable rule, and that the Mississippi rule which bars the buyer of food in a sealed container from an action on the implied warranty of fitness against the retailer dove-tails with this rule, producing a sound and reasonable result.

There remains, however, one area in the Mississippi law concerning implied warranties where the innocent buyer who has been injured by the purchase of defective goods has no remedy.[83] Presumably Mississippi allows the ultimate consumer to bring an action *ex contractu* directly against the manufacturer as an exception to the general rule *only* in the case of food sold for human consumption. Therefore, where the buyer has purchased machinery, for example, containing a latent defect from a dealer, he has no cause of action against the manufacturer for breach of implied warranty of fitness, for there is no privity of contract between the buyer and the manufacturer. Further, unless the latent defect were

[79]Curtis Candy Co. v. Johnson, 163 Miss. 426, 141 So. 763 (1932).

[80]Missouri Bag Co. v. Chemical Delinting Co., 214 Miss. 13, 58 So.2d 71 (1952).

[81]Ibid.

[82]Ibid.

[83]Of course the buyer may bring a tort action for negligence against the manufacturer or the dealer, but he may find it practically impossible to prove negligence.

one known by the dealer, or which should have been known by him, the buyer has no cause of action against the dealer for breach of implied warranty of reasonable fitness.

Inevitably, this situation gives rise to the question—who should bear the loss as between the innocent seller and the innocent buyer? The position taken by the *Uniform Sales Act* is that the seller should bear the loss, whether he be the manufacturer or the dealer.[84] It is submitted that this is the better view. Not only does the dealer undertake to furnish goods to the public, but he usually is in a better financial position to bear any loss which may result from defects in the goods he sold. Furthermore, the dealer can make himself whole in an action for breach of implied warranty against the manufacturer, with whom he has privity of contract. Mississippi should follow the *Uniform Sales Act* on this point.

Clyde E. Bracken, Jr.

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[84]See Uniform Sales Act § 15 (1), which provides that the implied warranty of fitness will be imposed "whether [the seller] . . . be the grower or manufacturer or not. . . ."

THE VOIR DIRE INSURANCE DILEMMA

Introduction

When a lawyer is representing a plaintiff in a damage suit against an insured defendant, it is normal for him to think that his lot will be considerably easier if he can somehow tell the jury that the defendant is insured. When a lawyer is defending in such an action, he is certain that his lot will be made more difficult if his adversary is able to communicate the fact of insurance to the jury.

Whether it is actually the fact that a plaintiff gains or a defendant loses anything by virtue of the jury's knowledge that insurance is involved seems to have had little bearing on the state of the law. It is clearly the general rule that in a personal injury or death action a plaintiff cannot introduce *evidence* for the purpose of informing the jury that an individual defendant is insured against liability.[1] Absent a statute to the contrary[2] this is as it should be. Evidence of insurance is inadmissible for the reason that it has no probative force to show that a defendant did an act for which liability ought to attach. Some courts supply a second reason to support this rule of exclusion. If, they hold, insurance is injected into the trial, the jury will be more likely to tip doubtful scales in a plaintiff's favor and to render a staggering award to be paid by a rich and soulless corporation.[3]

Mississippi by virtue of the case of *Herrin v. Daly*,[4] absolutely excludes evidence of liability insurance, and the extra-evidentiary devices, the insurance-by-innuendo, by means of which the information can be imparted are few and far between. Is the position of the Mississippi Supreme Court consonant with the practical realities of today? To attempt to answer such a question is only to become a partisan in the debate.

There are four stages in a trial proceeding at which a plaintiff's lawyer has an opportunity to demonstrate to the jury that his adversary is insured: (1) on the voir dire examination of the prospective jurors; (2) on direct examination of the plaintiff or of the plaintiff's witnesses; (3) on cross-examination of the defendant or of the defendant's witnesses; and (4) on the final argument or summation. The variety of techniques utilized at any of these stages of the proceedings varies directly with the inventiveness of the plaintiff's counsel. The success of the techniques varies directly with the vigilance of the trial court and defense counsel and the attitude of the appellate court. No matter how clever the device he has contrived or at what stage of the proceeding he attempts to employ it, no matter how lofty his motive, a plaintiff's counsel who tells a Mississippi jury that a defendant is insured is skating on thin ice with the danger of a mistrial hinging on every syllable. Nevertheless, there are the venturesome. They perhaps find their chances of success greater on the voir dire than during the trial proper.

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[1]Annot., 4 A.L.R. 764, 765 (1947).

[2]Three states have enacted so-called "direct action" statutes: La. R. S. 22:655 (1950); Wis. Stat. 85:93, 260:11 (1953); R. I. Gen. Laws 155:1 (1938), the effect of which is to make the question of the propriety of direct evidence of insurance moot, the jury obviously being aware that the tort-feasor is insured.

[3]Herrin v. Daly, 80 Miss. 340, 31 So. 790 (1902); Star Furniture v. Holland, 273 Ky. 617, 117 S. W. 603 (1938); Sutton v. Bell, 79 N.J.L. 507, 77 Atl. 42 (1910).

[4]Herrin v. Daly, supra note 3.

That a plaintiff no less than a defendant is entitled to an unbiased jury is a proposition basic to the common law. That a jury is not unbiased if any of its members have sufficiently vital insurance interests is clear.[5] The dilemma, then, is this: If the plaintiff is prevented from eliminating all veniremen tainted with insurance interests, he is denied the substantial right of a fair trial. If a defendant is shackled with a jury whose verdict is apt to be perverted because of the injection of an irrelevant issue, he is denied the substantial right of a fair trial. When the dilemma presents itself, it is the job of the court to try to balance the interests and arrive at a compromise solution that dispenses something approximating justice in the given case. Such a task is not an easy one.

It is not the purpose of this Comment to attempt to resolve the dilemma. It is rather the objective to suggest an unoriginal remedy that might eliminate the cause of the dilemma as it arises on the voir dire. Before the remedy is submitted, it is well to pose the problem slightly more in detail.

I. The Mississippi Cases

A. *Good Faith of Counsel and Waiver*

The first voir dire case, *Yazoo City v. Loggins*,[6] went up to the Mississippi Supreme Court thirty years ago. In the trial court plaintiff's counsel had been allowed to ask the jury panel whether or not any of them were interested in or represented any insurance company. Judge Cook, speaking for the Court, said that the general rule, announced twenty-four years earlier,[7] "does not prohibit counsel from testing within reasonable limits, and in good faith, the qualifications of the proposed jurors in respect to their connection with or interest in any indemnification the defendant may have."[8] The purpose of according this privilege was to enable counsel intelligently to exercise his right to challenge peremptorily or for cause. There was certainly nothing startling about the Court's position. It simply comported with the proposition that litigants have a right to an unbiased jury,[9] and that a venireman may be shown to be of the same society or corporation which has a contract of indemnity with the defendant.[10] But did it not leave the defendant in the hands of a jury with "inflamed sympathies and prejudices"?[11] Undeniably it did. In 1902 *evidence* of insurance was error because it tended to "seduce a verdict."[12] Twenty-four years later[13] questions to a panel which, though presumably aimed at procuring an unbiased jury, obviously had a tendency to seduce a verdict, were proper. Apparently

[5]This principle goes back at least as far as the eighteenth century. Though the right of counsel to examine on the voir dire did not exist at the time of Blackstone, he recognized that "jurors may be challenged *propter affectum*, for suspicion of bias or partiality." He found a *principal* challenge proper if it appeared that the juror "is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him. . . ." 3 Wendell's Blackstone's Commentaries 362 (1854).

[6]145 Miss. 793, 110 So. 833 (1926).

[7]Herrin v. Daly, 80 Miss. 340, 31 So. 790 (1902).

[8]Yazoo City v. Loggins, 145 Miss. 793, 808, 110 So. 833, 835 (1926).

[9]Fedorinchik v. Stewart, 289 Mich. 436, 286 N.W. 673 (1939).

[10]See note 5 supra.

[11]Chief Justice Marshall, dissenting in Pavilonis v. Valentine, 120 Ohio 154, 165 N. E. 730 (1929).

[12]Herrin v. Daly, 80 Miss. 340, 31 So. 790 (1902).

[13]Yazoo City v. Loggins, 145 Miss. 793, 110 So. 833 (1926).

Judge Cook felt that if the by-product of the questioning was prejudicial it was not error. Because the opinion was careful to point out that the voir dire examination "may usually be conducted in such a manner as not necessarily to disclose the existence of such insurance in the particular case,"[14] it is reasonable to suppose that the Court attached considerable significance to the good faith of the plaintiff's counsel.

It is submitted that the good faith test is of questionable worth. Though there may be only a modicum of truth in Judge Brian's observation that "not even the devil knoweth the thought of man,"[15] it is patent that the determination of the good faith of any individual, lawyer or layman, is a process that lies at least partly within the realm of gastronomical jurisprudence. On so insubstantial a peg should not hang so substantial an issue. An attorney is an officer of the court. The law denominates him an honorable man. If he states that his inquiries on the voir dire are in good faith, the court must either believe him and find his inquiries proper or disbelieve him and take appropriate disciplinary measures. The element of good faith can quite obviously be present even when there are no reasonable grounds for the insurance question. It is enough if the particular plaintiff's lawyer believes the grounds exist. Diligence has failed to unearth any disbarment proceedings grounded in bad faith interrogation on the voir dire. Yet it would be naive to suggest that every time a jury panel has been informed that insurance was a factor in the case, the knowledge came as a by-product of legitimate inquiry. Even assuming this idyllic state of affairs, the mental attitude of the examiner has no relation to the damage the question does to the defendant. Whether the lawyer asking the questions asks them in good or bad faith the net effect is precisely the same. The conclusion is inescapable that the good faith test is no solution to the dilemma. It is plain that if the injustices produced by the dilemma are to be eliminated something other than the good faith test must be contrived.

In *Lee County Gin Co. v. Middlebrooks*,[16] decided seven years after the *Loggins*[17] case, plaintiff's cousel was permitted, over defendant's objection, to ask veniremen whether or not they had stock in any insurance company or any interest therein.[18] After the objection to the question was overruled, defense counsel, apparently trying to neutralize whatever damage had been done by the oblique disclosure of insurance, remarked that "the insurance company we had our insurance in is 'busted'." In holding that the trial court's ruling was not reversible error, the Court expressly relied on the *Loggins* case and thought *Herrin v. Daly* was not in point. It is not altogether clear whether the Court thought plaintiff's voir dire interrogation was proper per se or whether it thought that even if it was improper the defendant, by this remark, had acquiesced in the abuse. The opinion simply says, "Under these circumstances . . . there is no error."[19] Judge Ethridge, twenty-two years later,[20] thought that the 1931 Court went along with the plaintiff because the defendant "waived

[14]Id. at 808, 110 So. at 835.
[15]Radin, Anglo-American Legal History 264 (1936).
[16]161 Miss. 422, 137 So. 108 (1931).
[17]Yazoo City v. Loggins, 145 Miss. 793, 110 So. 833 (1926).
[18]Lee County Gin Co. v. Middlebrooks, 161 Miss. 422, 428, 137 So. 108, 109 (1931).
[19]Id. at 429, 137 So. at 109.
[20]Shearron v. Shearron, 219 Miss. 27, 68 So. 2d 71 (1953).

his objection by such a statement."[21] Regardless of whether Judge Ethridge is right or wrong in his surmise, the exponents of the insurance-by-indirection technique can rely on the *Middlebrooks* case as a shield against a mistrial only when defense counsel has bungled. The good faith test, reiterated in *Middlebrooks,* is, of course, vulnerable to the same objections raised against it with reference to *Loggins. Middlebrooks,* then, provides no formula for the resolution of the dilemma, which formula, if it is to serve well, must needs allow a plaintiff to protect himself "against any inadvertent acceptance of an interested or biased juror and at the same time prevent the inquiry of a juror on his voir dire examination as to the existence or nonexistence of such interest or bias."[22]

B. *Curing the Error by Jury Instruction*

Three years after the *Middlebrooks* decision came *Avery v. Collins,*[23] wherein plaintiff's counsel asked the jury panel whether or not any of them "were engaged in the business of accident or indemnity insurance."[24] Defendant objected. The objection was overruled. Defendant then requested that the jury be instructed that insurance had nothing to do with the merits of the case. The request was refused. Writing for the Court which affirmed on liability and reversed on damages, Judge Griffith[25] held that the refusal of the trial court to admonish the jury "that the matter of insurance shall have nothing to do with the decision"[26] was error.

The opinion of the Court is as important for what it does not say as it is for what it does say. It does not say that the lower court was reversed on the issue of damages because it was error to permit the plaintiff's counsel to question the panel respecting insurance interests. It does say that the reversible error was the refusal of the trial court to give the requested admonition. The fair inference is that if the jury had been told to disregard the insinuation respecting insurance the lower court would have been affirmed on liability *and* damages. It is submitted that if a juror has become prejudiced as a result of insurance by innuendo there is not very much difference between his state of mind before and after a trial judge's admonition. "To attempt a distinction between the two is equivalent to giving weight to the mental processes of an ostrich that puts its head in the sand and assumes the nonexistence of a danger that thereby it is unable to see."[27]

Another significant feature of *Avery v. Collins* is Judge Griffith's proposal for solving the ubiquitous dilemma. He suggests, by way of implementing the plan outlined in *Loggins,*[28] that there is indeed a method by which the voir dire examination may usually be conducted so

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[21]Id. at 60, 68 So.2d at 85.

[22]Pavilonis v. Valentine, 120 Ohio 154, 165 N.E. 730 (1929).

[23]171 Miss. 636, 157 So. 695 (1934).

[24]Id. at 649, 157 So. at 699.

[25]Judge Griffith's general attitude in the area under discussion was unmistakable. See, for example, his opinion in Walley v. Williams, 201 Miss. 84, 28 So. 2d 579 (1947) wherein he stated that ". . .if we should accept that proposition as true [that most jurors know all employers carry liability insurance], we should be confronted with the deeper question whether trials before jurors of personal injury cases would be valid under the due process clause of the federal Constitution. . . ."

[26]Avery v. Collins, 171 Miss. 636, 650, 157 So. 695, 699 (1934).

[27]Johns v. Shinall, 103 Colo. 381, 86 P.2d 605 (1939).

[28]Yazoo City v. Loggins, 145 Miss. 793, 110 So. 833 (1926).

as to guarantee plaintiff a non-insurance jury and at the same time to protect a defendant from the bias that follows insurance by insinuation. A prospective juror, Judge Griffith says, may be asked "what business he is in, and, if he answer, for instance, that he is a farmer, then the further precautionary question may be put to him whether he has any other business . . . and if he answers that he has not, that usually ought to end the privilege. . . ."[29] It is deferentially submitted that Judge Griffith's formula would not resolve the dilemma. What happens if the farmer answers the "other business" question by announcing that he sells a little insurance now and then as a sideline? The plaintiff's lawyer will have abided by Judge Griffith's instructions, but when he excuses the farmer-insurance salesman, the defendant is almost certain to be saddled with a jury that is just as biased as if the insurance policy were admitted as exhibit *A*.

C. *The Prejudicial Effect Test*

M. & A. Motor Freight Lines v. Villere[30] is not a voir dire case, but it is important to this discussion for the reason that it sets up, as a criterion of the propriety of plaintiff's voir dire interrogation, the "prejudicial effect" of the disclosure rather than the motive (good faith test) for its adduction.[31] Since the holding of the Mississippi Supreme Court is that a defendant is in fact prejudicially affected when a jury panel is presented with the insurance issue, it would seem that an exploration into the degree of prejudice is a fruitless venture. If voir dire questions are to be prohibited because of the prejudicial effect of the answers they elicit, there is no way for a plaintiff's lawyer to assure himself that the board of directors of the insurance company which has contracted to indemnify the defendant against liability is not sitting on the jury.

To look at the "prejudicial effect" test is to expose its weaknesses. To look at it further is to reveal its incompatability with Judge Griffith's formula for resolving the dilemma under consideration. If the plaintiff's lawyer asks a venireman what business he is engaged in and the venireman replies that he is engaged in adjusting claims for a liability insurance company, the holding in *Avery v. Collins* would require that the defendant's motion for a mistrial be overruled, unless the defendant had been denied an instruction to the jury to disregard the reply of the venireman. Yet few would argue that when he walks out of the box his departure has had no prejudicial effect on the defendant's case.

D. *More Good Faith*

Two weeks after *Villere, Kennedy v. Little*[32] was decided. In the trial court plaintiff's counsel asked two prospective jurors if they or any of their close relatives were connected in any way with any liability insurance company. Defendant objected to the question, and the trial court sustained the objection. Defendant moved for a mistrial. His motion was overruled. The ruling was assigned as error but the point was not argued on appeal. Even so, the ruling was challenged at the conference of the judges. The verdict for the plaintiff was affirmed by

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[29]Avery v. Collins, 171 Miss. 636, 650, 157 So. 695, 699 (1934).
[30]190 Miss. 848, 1 So.2d 788 (1941).
[31]Id. at 858, 1 So.2d at 791.
[32]191 Miss. 73, 2 So.2d 163 (1941).

a three to three vote.[33] The controlling opinion, reverting to the good faith test, held that since the motives of plaintiff's counsel were not challenged there could have been no question as to the propriety of the voir dire examination.[34] Chief Justice Smith felt that the matter had been "put at rest"[35] by *Loggins, Middlebrooks,* and *Avery v. Collins.* If the matter had been put at rest at all, it did not rest very long.

E. *The Shearron Case*

The disinterment came in *Shearron v. Shearron.*[36] In the trial court plaintiff's counsel asked the panel whether any of them were working or had worked for a casualty company or an insurance company. Defendant objected and moved for a mistrial. In arguing the motion, after the jury was excused, plaintiff's counsel convinced the trial judge that in order to be able to exercise intelligently his right to challenge peremptorily or for cause he would have to ask the explosive questions. It appears that the plausibility of counsel's position hinged on the factual situation that numerous policyholders with the insurer of the defendant were farmers who were in effect partners with the insurer, that there was reason to suppose that at least one agent of the insurer operated in the county where the case was being tried, and that there was a possibility that there might be more than one agent operating in the area. There seems—at least in the trial court—to have been no question of the good faith of the plaintiff's lawyer or of the necessity of the questions he asked. The jury brought in a verdict for $17,500. On appeal the justices voted as follows: (1) for affirmance as to liability: Justices Arrington, Kyle, Holmes, Hall, and McGehee; (2) for affirmance as to both liability and damages; Justices Arrington, Holmes, and Hall; (3) for reversal and a new trial on the question of damages: Justices Lotterhos, Ethridge, Kyle, Roberds, and McGehee; (4) for reversal and remand as to both liability and damages: Justices Lotterhos, Ethridge, and Roberds. A tabulation of the votes resulted in an affirmance on the question of liability (5-3) and a reversal on the question of damages (5-3).[37]

The holding of the Court on the first appeal was that "the method of examining the jurors on their voir dire examination . . . could have had no prejudicial effect upon the jury in their determination of the case on the issue of liability,"[38] but that it had sufficient prejudicial effect on the issue of damages to constitute reversible error. This is not an unusual proposition, but it is one that admits of some examination. If a jury has sufficient discernment not to allow insurance-by-innuendo to muddy the waters on the issue of liability, it is not unreasonable to suppose that the same detached judgement which produced an uninflamed

[33] Robertson v. Mississippi Valley Co., 120 Miss. 159, 81 So. 799 (1919) held that a judgment of a court made on an equal division of the judges thereof is judicial precedent for the principles of law involved.

[34] Justice McGehee, joined by Justice Anderson and Griffith, apparently thought there was enough question of good faith to require a reversal. Kennedy v. Little, 191 Miss. 73, 82, 2 So.2d 163, 166 (1941).

[35] Id. at 77, 2 So.2d at 164.

[36] 219 Miss. 27, 68 So.2d 71 (1953), suggestion of error overruled in part, sustained in part, 219 Miss. 27, 69 So.2d 801, suggestion of error overruled in part, sustained in part, 219 Miss. 27, 70 So.2d 922 (1954).

[37] Justice Lee took no part in the decision of the case.

[38] Shearron v. Shearron, 219 Miss. 27, 52, 68 So.2d 71, 81 (1953).

verdict respecting liability might be relied on to do justice on the issue of damages. The intricacy of the mathematics of the *Shearron* case is exceeded only by the speed and dexterity with which the Court modified its position. On the first appeal, November 23, 1953, in a per curiam opinion, the verdict for the plaintiff was reversed on the issue of damages "for the reasons set forth in the opinion written by Justice Ethridge"[39] who concurred in part and dissented in part. Justice Ethridge[40] thought that "the size of the verdict, $17,500, in favor of a 78-year old appellee with no proof of life expectancy, against her daughter, was very probably affected by the voir dire examination indicating defendant was covered by liability insurance." Justice Ethridge, and by adoption the Court, then, on the first appeal, obviously concluded that insurance via innuendo had resulted in a biased jury on the issue of damages. Yet two months later, on the first suggestion of error,[41] in a per curiam opinion, the lower court was affirmed on liability *and* damages, the affirmance on damages being conditioned on a $5,000 remittitur.

In the two months that elapsed between the first opinion and the first suggestion of error Justices Lotterhos, Ethridge, Kyle, Roberds, and McGehee apparently decided that the insinuation of insurance was not as inflammatory and prejudicial as at first they had suspected. That a court has a right, and often time a need, to change its mind is not questioned, but there does seem to be some logic in the proposition that if the reference to insurance was prejudicial as to the size of the verdict on November 23, 1953 it was equally prejudicial on January 25, 1954. It is respectfully submitted that a remittitur is an unsatisfactory method of dealing with the prejudice. It merely attaches a price tag to it.

A careful look at the *Shearron* case invites the conclusion that the Court was in no wise guilty of an error of judgment. The difficulty is inherent in the dilemma that pervades damage suits in Mississippi. By definition[42] a dilemma is a situation involving a choice between two equally unsatisfactory alternatives. A dilemma cannot be solved, it must be remedied.

II. Suggested Remedy

A. *Direct Action*

Probably the most obvious way to deal with the dilemma that besets our Court would be the enactment by the Legislature of a "direct action" statute similar to the one in operation in Louisiana.[43] The Louisiana statute has been held constitutional.[44] It has been held not to contravene any public policy in Mississippi.[45] It has been the object of considerable advocacy. One writer, for example, says, "Under such a statute all the subtle and divers means by which the plaintiff's counsel have for years sought to suggest the fact of insurance to the jury become archaic and outmoded. The court and jury are then faced squarely with the problem

[39]Id. at 33, 68 So.2d at 72.

[40]Id. at 59, 68 So.2d at 85.

[41]219 Miss. 27, 69 So.2d 801 (1954).

[42]Webster, New International Dictionary (1930).

[43]La. R.S. 22:655 (1950).

[44]Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954), rehearing denied, 348 U.S. 921 (1955).

[45]Burkett v. Globe Indemnity Co., 182 Miss. 423, 181 So. 316 (1938), overruled on other grounds, McArthur v. Maryland Casualty Co., 184 Miss. 663, 186 So. 305 (1939).

whether the jury system has sufficient vitality and strength so that a reasonable approximation of justice can be achieved between an injured or bereaved person on one hand, and a corporation whose business it is to insure against liability arising from accidents on the other hand."[46] Doubtless the vitality of the jury system will continue to justify the confidence placed in it; (in spite of the adverse criticism engendered by the abuse of the voir dire).[47] But there is no getting around the fact that if insurance is prejudicial, legislative sanction would not make it less so. Nor can legislative sanction render evidence material if it has not probative force.

It is improbable that the Mississippi Legislature will enact a "direct action" statute any time soon. This conclusion seems reasonable in light of the general and altogether understandable attitude of the insurance companies. If the companies are not the real parties in interest in negligence cases by virtue of having contracted to indemnify defendants being sued, they are certainly real and articulate parties in interest when a legislature starts considering an insurance bill. That most companies are opposed to "direct action" statutes is generally conceded. That there is ample opulence back of that opposition to prevent the enactment of such a law in this state within the foreseeable future is probable. Hence, it would be unrealistic to suggest that the Mississippi Supreme Court will be "rescued" from its dilemma by a direct action statute.

B. *Questionnaire*

The most promising remedy for the dilemma seems to be a pre-trial questionnaire[48] that would require all citizens summoned for jury service to disclose in advance of the first day of the term of court to which they are summoned any insurance interests or connections which they might have.[49] The questionnaire forms could be delivered by the sheriff along with the summonses. The forms could be returnable to the office of the circuit clerk before the first day of the term of court. Thus, the persons summoned would have a reasonable time to study the questions, properly supply the answers, and make oath that the responses given were true and correct. It is important to emphasize that the information required by the questionnaires would be on file in the office of the clerk *before* any jury was empanelled or assigned to a case.

The information furnished by the questionnaires would be available

[46]Kramer, "The Role of Casualty Insurance Companies In Automobile Casualty Litigation—Open or Concealed," in Section of Insurance Law, 1949 Proceedings, American Bar Association 118 (1949).

[47]No other single cause has had greater effect in bringing jury trial into disrepute than the abuse by counsel of the voir dire examination. Grant, "Notes on Judicial Organization and Procedure," in 24 American Political Science Review 117, 127 (1930).

[48]This device has been suggested, in one form or another, in "A Successor to the Good Faith Rule—Pre-Trial Questionnaires and Adequate Jury Instruction," 48 Ill. L. Rev. 657 (1948); note, 52 Harv. L. Rev. 166 (1938); "Jury—Examination of Prospective Jurors on Voir Dire", 17 Minn. L. Rev. 299 (1933); Nilles, "The Right to Interrogate Jurors with Reference to Insurance in Negligence Cases", 3 Dakota L. Rev. 406 (1931). At least one federal court has approved the practice of a trial judge's questioning panel members on the first day of the term touching insurance interests. The answers given were made available to all parties with cases to be tried at the term. City Ice & Fuel Co. v. Dankmer, 52 F. 2d 929 (4th Cir. 1931).

[49]This proposal should in no way be construed to advocate the abolition of the statutory right of counsel to examine the prospective jurors on the voir dire on legitimate issues other than insurance interests.

to the trial judge and to any attorney with a case on the docket at the term. Since the questionnaires would yield up all information touching insurance interests of the prospective jurors, there would never be any need or excuse for a voir dire question touching insurance. To state it more simply: If the judge and the lawyers in a case already know the answer to a particular question, nobody can very well argue that he ought to have a right to ask that question on the voir dire.

This suggested remedy, then, would afford a method whereby a plaintiff's counsel could protect himself against a contaminated jury without the constant threat of a mistrial. With all the insurance information already at his command he could excuse a juror *without in any manner insinuating insurance into the proceeding.* A peremptory challenge requires no explanation.[50] In addition it is likely that the questionnaires would disclose sufficient information for the court to dismiss some of the veniremen for cause.

It is readily apparent that a plaintiff's lawyer who is motivated by something less than good faith will find that the proposed plan deprives him of the benefits of the insurance-by-innuendo technique. He should be so deprived.

Would the suggested plan guarantee defense counsel a jury unbiased by the insurance issue? If citizen Jones, for example, upon being handed a summons for jury duty, received at the same time a questionnaire requiring him to disclose his insurance interests or connections, would not the very tenor of the questionnaire lead him to believe that he was being hailed into court to try a case involving insurance? Not at all. While it is true that a substantial part of the litigation tried by our courts involves insurance, there is no certainty that citizen Jones' case would. And, too, the procedure would eventually be looked upon as routine. On the other hand, suppose that the questionnaire discloses that citizen Jones has vital insurance interests, and that the jury on which he sits is assigned to a damage suit underwritten by an insurance company. The plaintiff's lawyer would excuse him without contaminating the rest of the panel.

The practicability of the proposed plan quite obviously depends on the skill with which the questionnaire submitted to citizen Jones is drafted. A legislative committee framing a bill to effectuate the plan under discussion or one similar to it should take counsel with plaintiffs' lawyers, defendants' lawyers, undecided lawyers, insurance companies, judges, legal scholars and teachers, and any other respectable sources available.[51]

[50]The process of excusing a juror because of insurance interests disclosed on his questionnaire would be even more effective under the Stennis "Struck Jury" system. Pigott, "Stennis-Coleman-Brady System of Jury Selection in Mississippi," 25 Miss. L.J. 31 (1953).

[51]There follows a suggested list of questions which is designed to cover most of the material a plaintiff's lawyer might conceivably wish to bring out on the voir dire.

1. Name.
2. Present home address.
3. Address of present employer.
4. Nature of present employment.
5. If you are self employed, what is the address at which you do your principal work?
6. Are you now or have you ever been an officer, director, stockholder, agent, representative or employee of any insurance company or insurance association of any kind?

III. CONCLUSION

The purpose of this Comment has been to look at the voir dire examination of prospective jurors in Mississippi, to demonstrate that no

7. If your answer to question 6 was yes, list the name and address of the company or association involved.

8. If your answer to question 6 was yes, state the nature of your relationship to the company or association and the duration of such relationship.

9. Do you now have or have you ever had any intimate friends or relatives by blood or marriage (including father, mother, son, daughter, uncle, aunt, grandfather, grandmother, grandson, granddaughter, and first cousins) who are now or have in the past been an officer, director, stockholder, agent, representative, or employee of any insurance company or insurance association of any kind?

10. If your answer to question 9 was yes, state

A. The name and address of the person so related to the company or association.

B. The name and address of the company or association to which he or she is so related.

C. The nature of his or her relationship to the company or association.

D. The duration of his or her relationship to the company or association.

E. The relationship of the person to you.

11. Are you now or have you ever been financially interested, directly or indirectly, in any insurance company or insurance association of any kind?

12. If your answer to question 11 was yes,

A. State the name and address of the company or association.

B. Briefly describe your interest.

13. Have you ever been a party litigant in a civil lawsuit of any kind?

14. If your answer to question 13 was yes,

A. Were you a plaintiff or defendant?

B. When and where was the case tried?

C. Briefly describe the nature of the litigation and state the outcome.

D. Were you satisfied or dissatisfied with the outcome?

15. Do you own or regularly drive a motor vehicle of any type or kind?

16. If your answer to question 15 was yes, is the vehicle covered by liability or indemnity insurance of any kind?

17. If your answer to question 16 was yes, state the name and address of the company or association carrying the insurance.

18. Do you or any of your intimate friends or relatives (as listed in question 9) have or have you or they ever had any claim of any kind against any insurance company or insurance association?

19. If your answer to question 18 was yes,

A. State the name and address of the person asserting the claim.

B. What is or was his or her relationship to you?

C. State the name and address of the company or association against which the claim is or was asserted.

D. Briefly describe the circumstances under which the claim is or was asserted.

20. Is there now being or has there ever been asserted a claim of any kind against you or any of your intimate friends or relatives (as listed in question 9)?

21. If your answer to question 20 was yes,

A. By whom is or was the claim asserted?

B. Against whom is or was the claim asserted?

C. Briefly state the nature of the claim.

22. Has any claim which has ever been asserted by you or any of your intimate friends or relatives (as listed in question 9) or against you or any of your intimate friends or relatives (as listed in question 9) been settled by an insurance company or insurance association?

23. If your answer to question 22 was yes,

A. State the name and address of the person or firm asserting claim.

B. State the name and address of the person or firm against whom the claim was asserted.

C. State the name and address of the Company or association which settled the claim.

D. Briefly state the nature of the claim.

formula exists under the present system which will guarantee a plaintiff a non-insurance jury while it guarantees a defendant a non-inflamed jury, and to propose a remedy for the dilemma that besets our Court. The observations made herein are necessarily confined to an isolated segment of a complicated field of law. No attempt has been made to deal with the problem as it arises in phases of a judicial proceeding other than the voir dire examination of jurors. No attempt has been made to examine the problem as it is found in the conflict of laws. It is, therefore, readily conceded that even if the remedy suggested were effected by legislation, the problems remaining in this field would be numerous and thorny. It is submitted, however, that if the proposed plan accomplished nothing else, it ought at least to prevent the trial court from being forced to "steer a course between the Scylla of a packed jury on the one hand and the Charybdis of pettifoggery on the other."[52]

Scott Tennyson

[52]Putnam v. Pacific Monthly Co., 68 Or. 36, 130 Pac. 986 (1913), modified on rehearing, 68 Or. 36, 136 Pac. 835 (1913).

UNION SOLICITATION ON COMPANY PROPERTY

Introduction

The National Labor Relations Act gives to employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."[1] The act also declares it to be unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of these rights.[2] Since few non-union workers in Mississippi today are aware of their rights of self-organization guaranteed by the act, the avenue of communication to these workers must be kept open so that they may learn of these rights.[3] Existing unions usually carry the burden of acquainting workers with their self-organization rights and generally accomplish this by soliciting union membership among the workers so that they may bargain collectively, with the union as their bargaining agent.

Since workers spend a large portion of their time at their place of employment and may be more easily contacted in groups there, unions desire to carry on a greater part of their organizational activities at that place of employment. Employers, however, feel that the place of employment is a place of work only, and believe, therefore, that they should be allowed to prohibit union activity on their premises. They point out that organizational activities of unions often involve heated discussions, arguments or even violence, which interfere with efficient production. On the other hand, unions contend that if they are not allowed to use company property for their organizational activities the most appropriate place for unionization is unavailable, and, therefore, the employees' rights to self-organization are impeded.

This Comment will deal with the circumstances under which union organizers may carry out their activities upon company property and the circumstances under which they may be lawfully excluded. Primary emphasis will be placed upon company rules sometimes used to prevent union activity upon company property. The validity of rules prohibiting solicitation during working hours will be first considered, followed by a discussion of the validity of broad no-solicitation rules.

I. Rules Prohibiting Solicitation During Working Hours

It is generally held that an employer may prohibit union solicitation or other organizational activities on his property during working hours.[4] If it is found, however, that the no-solicitation rule is adopted or enforced discriminatorily, such enforcement will be prohibited.[5] In *NLRB v. Pey-*

[1]49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1952).

[2]49 Stat. 452 (1935), as amended, 29 U.S.C. § 158 (a) (1) (1952).

[3]Le Tourneau Co., 54 N.L.R.B. 1253 (1944).

[4]Rubin Bros. Footwear v. NLRB, 203 F.2d 486 (5th Cir. 1953); NLRB v. Edinberg Citrus Ass'n, 147 F.2d 353 (5th Cir. 1945); Universal Oil Products Co., 108 N.L.R.B. 68 (1954); Macon Textiles, 80 N.L.R.B. 1525 (1948); Texas Co., 80 N.L.R.B. 862 (1948); Pure Oil Co., 75 N.L.R.B. 539 (1947); Russel Elec. Co., 74 N.L.R.B. 769 (1947).

[5]NLRB v. Link-Belt Co., 311 U.S. 584 (1941); NLRB v. Clark Bros. Co., 163 F.2d 373 (2d Cir. 1947); Winona Knitting Mills, Inc., 163 F.2d 156 (8th Cir. 1947); NLRB v. May Dep't Stores, 154 F.2d 533 (8th Cir. 1946); NLRB v. Peyton Packing Co., 142 F.2d 1009 (5th Cir. 1944); Carter Carburetor Corp. v. NLRB, 140 F.2d 714 (8th Cir. 1944); NLRB v. Denver Tent & Awning Co., 138 F.2d 410 (10th Cir. 1943); NLRB v. Bersted

ton Packing Co.,[6] the company had no rule concerning solicitation before union activities began but rapidly adopted one forbidding solicitation of any kind when the union began an organizational campaign. It then discharged nine employees who were union members for violating the newly adopted rule. In holding this conduct to be an unfair labor practice the court said:

> "The rule against solicitation, though reasonable and in lawful form, was administered not according to its tenor but in an arbitrary and discriminatory manner. Such conduct on the part of an antagonistic management and its representatives, adroitly timed to cripple the strength of the union during its formative period, clearly warranted the findings of the Board that the right of the employees to organize for collective bargaining was interfered with, and that the discharges were discriminatory in that they resulted from union membership and activity."[7]

It is apparent, under this holding, that the validity of a rule prohibiting solicitation among employees during working hours does not depend entirely upon the form of the rule, but will depend in a great degree upon the method of enforcement of the rule as well as the reasons for its adoption. It should be obvious that the adoption of a no-solicitation rule for the avowed purpose of prohibiting union solicitation would be unlawful, particularly where various charitable and commercial organizations are permitted to continue solicitation among employees.[8] In addition, it is an unfiar labor practice for an employer to permit anti-union activities while prohibiting union activity.[9] In *Cherry Rivet Co.*,[10] the union distributed union buttons as a part of its organizing campaign. The employer responded by distributing buttons bearing the legend, "I AM FOR CHERRY RIVET," and then posted a notice threatening dismissal to any employee soliciting on company time. Another notice was posted by the company in which it set forth at length its opposition to the union and the reasons therefor. The notice urged employees to read it and "take a few minutes, on the company and digest the facts." In holding this to be an unfair labor practice, the Board said:

> "On the entire record . . . we find that by distributing Cherry Rivet buttons on company time and urging the reading of anti-union literature on company time, in contrast with its posting of a notice which forbade campaigning for the Union on pain of discharge but which failed to mention antiunion campaigning,

Mfg. Co., 124 F.2d 409 (6th Cir. 1942); Franchester Corp., 110 N.L.R.B. 1391 (1954); Grand Central Aircraft Co., 103 N.L.R.B. 1114 (1953); Cherry Rivet Co., 97 N.L.R.B. 1303 (1952); Editorial "El Imparcial" Inc., 92 N.L.R.B. 1795 (1951); Citizen-News Co., 88 N.L.R.B. 1413 (1950); Standard-Coosa-Thatcher Co., 85 N.L.R.B. 1358 (1949); Allen-Morrison Sign Co., 79 N.L.R.B. 904 (1948); Tomlinson of High Point, 74 N.L.R.B. 681 (1947).

[6] 142 F.2d 1009 (5th Cir. 1944).

[7] NLRB v. Peyton Packing Co., 142 F.2d 1009, 1010 (5th Cir. 1944); accord, H. J. Heinz Co. v. NLRB, 311 U.S. 514 (1951); International Ass'n of Machinists v. NLRB, 311 U.S. 72 (1940); NLRB v. Bradford Dyeing Ass'n, 301 U.S. 318 (1940); NLRB v. Brown Paper Mill Co., 133 F.2d 988 (5th Cir. 1943).

[8] NLRB v. William Davies Co., 135 F.2d 179 (7th Cir. 1943); Standard-Coosa-Thatcher Co., 85 N.L.R.B. 1358 (1949).

[9] NLRB v. Harbison-Walker Refractories Co., 135 F.2d 837 (8th Cir. 1943); Franchester Corp., 110 N.L.R.B. 1391 (1954); Cherry Rivet Co., 97 N.L.R.B. 1303 (1952); Editorial "El Imparcial" Inc., 92 N.L.R.B. 1795 (1951).

[10] 97 N.L.R.B. 1303 (1952).

> the Respondent [employer] accorded disparate treatment to union adherents and opponents."[11]

The points to be noted from this phase of the subject—no solicitation during working time—are: (1) It is not an unfair labor practice *per se* for an employer to prohibit all solicitation during working hours. (2) Neither is it an unfair labor practice for an employer to discharge an employee for violating this rule. (3) It is an unfair labor practice, however, for an employer to use the no-solicitation rule to discriminate against the union. (4) It is also an unfair labor practice to threaten employees with discharge or other penalties for union activities.[12]

II. Rules Prohibiting All Solicitation on Company Property

Many companies have adopted broad no-solicitation rules which prohibit all solicitation at all times (including free time) on company property. Except under special circumstances,[13] these rules have been held invalid only insofar as they deny employees the right to solicit on their own time.[14] Morever, a recent Supreme Court decision[15] held that the broad no-solicitation rules are effective to bar *all* solicitation by *strangers* (as distinguished from company employees). In this case a distinction was made to the effect that, while an employee may not be prohibited from soliciting union membership on company property during free time[16] except in special circumstances, an employer may usually prohibit non-employee union organizers from using his property at any time. Keeping this distinction in mind, the invalidity of broad no-solicitation rules as applied to employees will next be considered, followed by a discussion of the rights of non-employee union organizers.

A. *Applied to Employees*

In *Peyton Packing Co.*,[17] holding invalid a company rule which prohibited solicitation of any kind by an employee "while on property of

[11]Id. at 1306.

[12]These threats are usually made by managerial or supervisory personnel rather than the employer himself, but the employer is usually liable for their acts because they are his agents. The responsibility of an employer for the statements and threats of other employees is not a part of this Comment, but see annot., 146 A.L.R. 1062 (1943) for a collection of cases concerned with this problem. See also 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (2) (1952), "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly . . ." and 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (13) (1952), "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

[13]These special circumstances may arise, for example, when the soliciting of union membership during the employee's free time in a department store may interfere with customer relations. J. L. Hudson Co., 67 N.L.R.B. 1403 (1946); Meier & Frank Co., 89 N.L.R.B. 1016 (1950). In addition, an employer may sometimes prohibit all solicitation when there has been disorder and labor violence or there is threatened violence. Boeing Airplane Co. v. NLRB, 217 F.2d 369 (9th Cir. 1954); Johnson-Stephens & Shinkle Shoe Co., 54 N.L.R.B. 189 (1943).

[14]Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); NLRB v. American Tube Bending Co., 205 F.2d 45 (2d Cir. 1953); NLRB v. Lasalle Steel Co., 178 F.2d 829 (7th Cir. 1949); NLRB v. Clark Bros. Co., 163 F.2d 373 (2d Cir. 1947); Johnston Lawn Mower Corp., 110 N.L.R.B. 1955 (1954); Peyton Packing Co., 49 N.L.R.B. 828 (1943).

[15]NLRB v. Babcock & Wilcox Co., 76 Sup. Ct. 679 (1956).

[16]"No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." Id at 685.

[17]49 N.L.R.B. 828 (1943).

this company, or while on company time," the Board said:

> "The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the provinces of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. *Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.*"[18] (Emphasis added).

This statement by the National Labor Relations Board summarizes the law on the subject. The Supreme Court, in *Republic Aviation Corp. v. NLRB*,[19] cited the statement with approval.[20]

Since any rule which prohibits union solicitation by an employee during his free time is presumed to be discriminatory, the burden is upon the company to show that the rule is necessary either to maintain plant production or discipline. It has been held not unreasonable, however, for an employer, in the interest of keeping the plant clean and orderly, to prohibit the distribution of literature on company property at all times.[21] It should be remembered, nevertheless, that a broad scope of inference is open to the Board on questions of motive and discrimination where there is evidence indicating a desire to thwart or nullify unionization.[22]

The fact that the employee is being paid for the time is not conclusive of the fact that it is working time. An employee may be able to solicit union membership while the company is paying him, if it is during non-working hours.[23] In *NLRB v. Monarch Tool Co.*[24] the court said:

> "In our judgment, the Labor Board found properly that the respondent had violated section 8 (a) (1) of the National Labor Relations Act by maintaining a rule prohibiting the solicitation of union membership in the plant cafeteria during non-working hours, even though the employees were paid during non-scheduled lunch periods."[25]

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[18]Id. at 843.

[19]324 U.S. 793 (1945).

[20]Id. at 988, n. 10.

[21]Goodyear Aircraft Corp., 57 N.L.R.B. 502 (1944); North American Aviation, 56 N.L.R.B. 959 (1944); Tabin-Picker & Co., 50 N.L.R.B. 928 (1943).

[22]NLRB v. May Dep't Stores Co., 154 F.2d 533 (8th Cir. 1946).

[23]NLRB v. Monarch Tool Co., 210 F.2d 183 (6th Cir. 1954); Olin Industries, Inc. v. NLRB, 191 F.2d 613 (5th Cir. 1951); 1. F. Sales Co., 82 N.L.R.B. 137 (1949).

[24]NLRB v. Monarch Tool Co., supra note 21.

[25]Id. at 187.

This is the result universally reached, to the chagrin of many employers who consider that an employee's "working time" includes all the time for which he is paid. Regardless of the employers' feelings in the matter, however, the fact remains that an employee may solicit union membership among his fellow employees during his rest periods or lunch period even though he may be getting paid during that time. But a special rule obtains in the unionization of department stores. The Board has decided on several occasions that a department store may prohibit union solicitation on its selling floors, even during employees' off-duty time.[26] This, of course, is true because department stores, unlike industrial establishments, constantly have customers on the selling floor, and union solicitation in their presence is likely to interfere with the business of the employer.

B. *Applied to Non-Employees*

In reference to the validity of broad no-solicitation rules when applied to non-employees, the Supreme Court in *NLRB v. Babcock & Wilcox Co.*,[27] which was three decisions in one opinion,[28] refused to enforce a cease and desist order of the National Labor Relations Board, because the Board had failed to recognize the distinction between rules applicable to organizational activities of employees, on the one hand, and non-employees, on the other. In each of these cases the employer refused to permit distribution of union literature by non-employee union organizers on company-owned parking lots, and the Board issued a cease and desist order finding that it was unreasonably difficult for the union organizer to reach the employees off company property.[29] The plant involved in the *Babcock* case was located on a 100-acre tract about one mile from a community of 21,000 people. Approximately forty per cent of the 500 employees lived in that town and the remainder lived within a thirty mile radius. More than ninety per cent of the employees drove to work and parked in the company lot on which the union organizers sought to distribute literature. Because of traffic conditions the Board found it to be dangerous to distribute literature to employees as they left the parking lot. The employees had been contacted by the union through the mails, meetings on the street, telephone calls, and in their homes.[30] The conditions and circumstances in the other two cases were not materially different. In refusing to enforce the Board's order, the Court said:

> "It is our judgment . . . that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels

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[26]Meier & Frank Co., 89 N.L.R.B. 1016 (1950); Goldblatt Bros., Inc., 77 N.L.R.B. 1262 (1948); J. L. Hudson Co., 67 N.L.R.B. 1403 (1946); May Dep't Stores Co., 59 N.L.R.B. 976 (1944); Marshall Field & Co., 34 N.L.R.B. 1 (1941).

[27]76 Sup. Ct. 679 (1956).

[28]NLRB v. Seamprufe, Inc., 222 F.2d 858 (10th Cir. 1955); Ranco, Inc. v. NLRB, 222 F.2d 543 (6th Cir. 1955); NLRB v. Babcock & Wilcox Co., 222 F.2d 316 (5th Cir. 1955).

[29]The same result was reached in NLRB v. Monsanto Chemical Co., 225 F.2d 16 (9th Cir. 1955), where 85 per cent of the employees lived within 12 miles of the plant and over 67 per cent lived in a town of 2,000 inhabitants one mile from the plant.

[30]NLRB v. Babcock & Wilcox Co., 76 Sup. Ct. 679, 681 (1956).

> of communication[31] will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. . . . This is not a problem of always open or always closed doors for unionization on company property. Organization rights are granted to the workers by the same authority, the National Government, that preserves property rights.[32] Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization."[33]

The Court further stated that it rests with the Board to determine whether or not employees are so inaccessible off company property that non-employee union organizers should be allowed to solicit on company property.[34] The Court indicated this when it said:

> "The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of a plant and the living quarters of the employees[35] place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property."[36]

The holding in the *Babcock* case seems to give further strength to the ruling in *Livingston Shirt Corp.*[37] In that case the employer had a rule that "activities for or against any union must not be carried on during working hours." The plant manager made an antiunion but noncoercive speech to the employees during working hours, but refused to allow the union an opportunity to reply under similar circumstances. This conduct was held not to be an unfair labor practice.[38] The rule of the *Livingston* case, which has been repeatedly invoked by the Board[39]

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[31]In reference to this, the Court said, "The plants are close to small well-settled communities where a large percentage of the employees live. The usual methods of imparting information are available. [See, for example the text to footnote 29.] The various instruments of publicity are at hand. Though the quarters of the employees are scattered, they are in reasonable reach." Id. at 685.

[32]Is this sentence really true since property rights are preserved by the constitution and organization rights are granted by statute? It would seem that the preservation of property rights are of vastly more importance than the rights of organization.

[33]NLRB v. Babcock & Wilcox Co., 76 Sup. Ct. 679, 684 (1956).

[34]Ibid.

[35]This occasion will usually arise when the company owns the employee's residences or when there is a company owned town. NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949); NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948); W. T. Carter, 900 N.L.R.B. 2020 (1950); Weyerhaeuser Timber Co., 31 N.L.R.B. 258 (1941).

[36]NLRB v. Babcock & Wilcox Co., 76 Sup. Ct. 679, 685 (1956).

[37]107 N.L.R.B. 400 (1953).

[38]This holding by the Board overruled Bonwit Teller, Inc., 96 N.L.R.B. 608 (1951), in which the rule was announced that an employer's refusal to give union "equal opportunity" to address its employees in the plant was unlawful.

[39]Cooper's, Inc., 107 N.L.R.B. 979 (1954); Detergents, Inc., 107 N.L.R.B. 1334 (1954); Nationally Famous Mary Jane Shoes, 107 N.L.R.B. 1396 (1954).

and was partially based upon statute,[40] is:

> "In the absence of either an unlawful broad no-solicitation rule (prohibiting union access to company premises on other than working time) or a privileged no-solicitation rule (broad, but not unlawful because of the character of the business),[41] an employer does not commit an unfair labor practice if he makes a pre-election speech on company time and premises to his employees and denies the union's request for an opportunity to reply."[42]

If it is remembered that at the time of this holding the Board was making no distinction between employee solicitation and non-employee solicitation, it would appear to be an open question now, after the holding in *Babcock & Wilcox Co.*, whether a company no-solicitation rule lawfully excluding solicitation by non-employees, in conjunction with an anti-union but noncoercive speech gives a "non-employee" or "stranger" union organizer a right to the use of company property to reply to the speech; but if the no-solicitation rule is unlawful *as to him* (as is the case where special circumstances render alternative avenues of communication unreasonable), it would appear that he does. However, when a rule (lawful or unlawful) excluding solicitation by employees is in effect, an "employee" union organizer conclusively has a right to the use of company property to reply to such a speech.

III. Conclusion

The final realization by the courts that non-employee union organizers have no inherent right to use company property for their organizational campaign seems to better equalize the relations between unions and management and should contribute to more harmonious labor relations. Even though labor has the right to be informed and to organize, a landowner still has some property rights. The thing that gives rise to much litigation in this field is the problem created in the balancing of these rights. There is no magic formula announced by the courts to enable one to determine when one right must yield to the other, but we do know from the decision in the *Babcock* case that non-employee union organizers must be allowed on company property only when the employees are otherwise "beyond the reach of reasonable union efforts to communicate with them."[44] The holding in this case also indicates that non-employee union organizers may not come on company property when the employees reside within a reasonable distance from their place of employment and can be reached by mail, telephone, meetings on the

[40]"The expression of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158 (c) (1952).

[41]See, e.g., Marshall Field & Co., 93 N.L.R.B. 88 (1952), for an application of the rule concerning solicitation on the selling floor in department stores.

[42]Livingston Shirt Corp., 107 N.L.R.B. 400, 409 (1953).

[43]"The Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available." NLRB v. Babcock & Wilcox Co., 76 Sup. Ct. 679, 685 (1956).

[44]See the quotation to footnote 36.

street, and visiting in the home. Even in instances where it is decided that the landowner's property rights must yield to organizational rights, the order of the Board granting access to non-employee union organizers will usually provide for reasonable regulation of their conduct,[45] and an employer may require organizers to register at the gate,[46] and sometimes may deny them access to particular areas.[47] The determinations of the Board in usually holding invalid company rules prohibiting solicitation by employees during their free time seem fair since any other holding in this instance would restrict the employee's freedom of speech. The fact that an employee is being paid for his time should not require him to remain completely silent on the issue of self-organization unless his opinions, when conveyed, would interfere with efficient production.

The rule in the *Babcock* case is not an undue burden on union organization, because as noted above, all employees still have the right to solicit union membership among other employees during their off-duty hours. If the union cannot, through solicitation off the company premises, convince one employee of the benefits of unionization so that that employee may solicit on the company premises, then apparently that particular plant is not in favor of being represented by that particular union, and solicitation on company premises by a stranger would be in vain. It is no argument to say that employees who solicit union membership are subject to reprisals, for the law is clear that any interference by an employer with the rights guaranteed by the act is unlawful, and to admit that our courts cannot enforce the law is to admit that the act is unworkable. And this is not the case.

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[45]See, e.g., NLRB v. Lake Superior Lumber Corp., 167 F.2d 147, 150 (6th Cir. 1948); Seamprufe, Inc., 109 N.L.R.B. 24, 25 (1954).

[46]Motor Freight, Inc., 57 N.L.R.B. 1340 (1944).

[47]See, e.g., Monolith Portland Cement Co., 94 N.L.R.B. 1358, 1366 (1951); Westinghouse Elec. Corp., 91 N.L.R.B. 955, 958 (1950).

RECENT DECISIONS

Criminal Law — A Series of Petty Thefts as Constituting Grand Theft

Petitioner received a series of payments of welfare benefits upon a representation that she had no income other than a small amount from her husband. It was later discovered that petitioner had been employed during this period and had falsely represented the status of her income. Petitioner was charged in an information with two counts of grand theft; the first count covering a period of about seven months, and the second count covering a period of more than three months. No one welfare benefit was sufficient to meet the California statutory grand theft minimum. Held: The unlawful taking of a series of payments of welfare benefits over a period of time based upon one false representation constitutes grand theft rather than a series of petty thefts. *Dawson v. State,* 292 P.2d 574 (Cal. 1956).

The problem involved in this case is one which has given rise to many fine distinctions. In order to treat the series of acts as one crime, there must be evidence of a single, sustained and continuing impulse or purpose (single criminal intent).[1] Though the Mississippi decisions[2] and the decisions of some other jurisdictions[3] are couched in terms of "continuous transaction" without specific reference to single criminal intent, it is apparent that the theory is the same.[4] Thus, where there is adequate other evidence of a single, sustained and continuing impulse or purpose, the fact that the takings involved a number of *days,* or perhaps *weeks,* is generally held to be immaterial.[5] It was held in *People v. Cox*[6] that the defendant, who had been convicted of "belting" subway turnstiles, was properly convicted of two crimes of grand larceny even though the successive takings covered a period of eleven months in the first larceny, and more than ten months in the second larceny. Extreme cases may be

[1]See 2 Wharton, Criminal Law, § 1171 (12th ed. 1932); 32 Am. Jur., Larceny § 9 (1941); 52 C.J.S., Larceny § 53 (1947).

[2]Aultman v. State, 126 Miss. 629, 89 So. 265 (1921); Patterson v. State, 171 Miss. 1, 156 So. 595 (1934); Smith v. State, 153 Miss. 585, 121 So. 282 (1929); Dodson v. State, 130 Miss. 137, 93 So. 579 (1922); Scarver v. State, 53 Miss. 47 (1876).

[3]Sweek v. People, 85 Colo. 479, 277 Pac. 1 (1929); Hearn v. State, 55 So.2d 559 (Fla. 1951); State v. Mandich, 24 Nev. 336, 54 Pac. 516 (1898); Flynn v. State, 47 Tex. Crim. 26, 83 S.W. 206 (1904); Omohundro v. Commonwealth, 138 Va. 854, 121 S. E. 908 (1924).

[4]Annot., 136 A.L.R. 948 (1942).

[5]Brown v. State, 200 So. 630 (Ala. 1941); Carl v. State, 125 Ala. 89, 28 So. 505 (1900). In the above cases the exact words were used; there are many other cases showing that time is immaterial: People v. Dillon, 1 Cal. App. 2d 224, 36 P.2d 416 (1934); Woods v. People, 222 Ill. 293, 78 N.E. 607 (1906); State v. Vandewater, 203 Iowa 94, 212 N.W. 339 (1927); In re Jones, 46 Mont. 122, 126 Pac. 929 (1912); Cody v. State, 31 Tex. Crim. 183, 20 S.W. 398 (1892); West v. Commonwealth, 125 Va. 747, 99 S.E. 654 (1919).

[6]286 N.Y. 137, 36 N.E.2d 84 (1941). (Defendant employed a method by which the fare-registering machine was turned back so that the abstraction of nickels would not be readily apparent).

found where successive takings lasting for periods of *two*[7] and *three*[8] *years* have been held to constitute a single crime. On the other hand, where there is inadequate other evidence of a single criminal intent, the fact that the takings were at different times may determine that each taking is a separate offense.[9] Morever, where again there is adequate other evidence of a single criminal intent, neither the fact that the takings were from *different places* in the same building[10] or on the same premises,[11] nor the fact that they were from *different owners*,[12] is of itself conclusive of separate crimes. Where the takings are from different owners, there are three different views.[13] The great majority of cases—including Mississippi[14]—reasons that since the offense is one against the public, it matters not that the taking was from one or several individuals.[15] A distinct minority holds that the taking of the property of each person is necessarily separate and distinct, because of the separate trespass to the person or property of each owner.[16] Three jurisdictions allow the state the option of treating the act as one crime or a series of crimes on the

[7]Willis v. State, 134 Ala. 429, 33 So. 226 (1902); State v. Kurth, 105 Mont. 260, 72 P.2d 687 (1937).

[8]State v. Peters, 43 Idaho 564, 253 Pac. 842 (1927); State v. Wetzel, 75 W. Va. 7, 83 S.E. 68 (1914).

[9]People v. Serna, 43 Cal. App. 2d 106, 110 P.2d 492 (1941); Track v. People, 35 Colo. 83, 83 Pac. 1010 (1905); Patterson v. State, 171 Miss. 1, 156 So. 595 (1934); Camp v. State, 7 Okla. Crim. 531, 124 Pac. 331 (1912); Lacey v. State, 22 Tex. Crim. 657, 3 S.W. 343 (1887).

[10]People v. Johnson, 81 Mich. 573, 45 N.W. 1119 (1890) (held the acts constituted a single larceny even though from different owners on different floors of a granary); State v. Hall, 111 Kan. 458, 207 Pac. 773 (1922); Wilson v. State, 70 Tex. Crim. 631, 158 S. W. 516 (1913).

[11]See State v. Sampson, 157 Iowa 257, 138 N.W. 473 (1912) (held the takings constituted one crime despite the fact the objects were stolen from different owners from different places on the same premises even though several minutes may have intervened between the seizing of the articles); Barnes v. State, 43 Tex. Crim. 355, 65 S.W. 922 (1901) (held the taking of two bales of cotton thirty yards apart in a cotton yard would constitute one crime provided the two bales of cotton were taken in one trip).

[12]Hearn v. State, 55 So.2d 559 (Fla. 1951); Dean v. State, 9 Ga. App. 571, 71 S.E. 932 (1911); State v. Sampson, 157 Iowa 257, 138 N.W. 473 (1912); Nichols v. Commonwealth, 78 Ky. 180 (1879); State v. Warren, 77 Md. 121, 26 Atl. 500 (1893); State v. Mjelde, 29 Mont. 490, 75 Pac. 87 (1904); State v. Hennessey, 23 Ohio St. 339, 13 Am. Rep. 253 (1872); State v. Kieffer, 17 S.D. 67, 95 N.W. 289 (1903). Note also other cases in Annot., 28 A.L.R.2d 1182 (1953), at p. 1185. The above cases represent the majority doctrine (adopted by about thirty jurisdictions) that takings from *different owners* constitute one crime. It should be noted that most of these cases require the taking to occur both at the *same time* and at the *same place*.

[13]Annot., 28 A.L.R.2d 1182 (1953).

[14]Smith v. State, 153 Miss. 858, 121 So. 282 (1929); State v. Quintini, 51 So. 276 (Miss. 1910); Dalton v. State, 91 Miss. 162, 44 So 802 (1907); Ward v. State, 90 Miss. 249, 43 So. 466 (1907);

[15]See notes 12 and 14 supra. An interesting problem of collateral interest arises: May a person who has been convicted of one of the acts in a series plead double jeopardy as a bar to any further prosecution? The cases in these footnotes would necessarily allow a plea of double jeopardy since they hold there is but one crime.

[16]In re Allison, 13 Colo. 525, 22 Pac. 820 (1889); Commonwealth v. Hoffman, 2 Mass. 409 (1876); State v. Nelson, 8 N.H. 163 (1835); State v. Bynum, 117 N.C. 752, 23 S.E. 219 (1895); Phillips v. State, 85 Tenn. 551, 3 S.W. 434 (1887). In regard to the collateral question discussed in note 15 supra, these cases would hold the successive acts distinct crimes thereby disallowing a plea of double jeopardy.

theory that the courts will act as a check in passing sentence and will not allow injustice or oppression.[17]

The court in the instant case states that "the particular facts and circumstances of each case determines the question."[18] This flexible view has been adopted in other decisions,[19] and would seem proper in dealing with the problem, since there are so many combinations of time, place, and circumstances. If a court should allow itself to become *rule bound* in regard to the many aspects of the problem, it is certain that injustice would result in many cases. Therefore, it is submitted that the above quoted approach of the instant court is correct and that the courts should consider time, place, and circumstances on the basis of the facts of the particular case, realizing that no one of the elements is necessarily controlling.

Michael D. Haas

Domestic Relations — Separation Agreements — Modified Where Incorporated into Divorce Decree

Prior to their divorce appellant and appellee entered into a written agreement whereby the husband was to convey to the wife their home free of debt, and to pay her two hundred dollars per month "alimony". The agreement was fully incorporated into the final decree.[1] The husband later filed a petition for modification of the alimony provision of the decree, alleging a change in circumstances. Modification was granted and the wife appealed on the basis that the alimony payments were based on a valid contract between the parties, and thus not subject to modification without consent of the parties. Held: The agreement as incorporated into the divorce decree was a consent decree and could be later modified as provided by statute,[2] since the statutory power of the divorce-granting court to later modify an alimony decree is not to be contracted away by the parties to the divorce. *Hughes v. Hughes,* 221 Miss. 264, 72 So.2d 677 (1954).

Separation agreements were void at common law[3] and in Mississippi,[4] though in this state where a trustee is named for the wife the agreement between the husband and the trustee is enforceable.[5] The general rule today is that such agreements are enforceable[6] if they conform to the

[17]Commonwealth v. Sullivan, 104 Mass. 552 (1870); State v. Lambert, 9 Nev. 321 (1874); Territory v. Heywood, 2 Wash. Terr. R. 180, 2 Pac. 189 (1883). In regard to the collateral question discussed in notes 15 and 16 supra, these cases by giving the state the option of treating the act as one offense or as several distinct offenses, would necessarily reject a plea of double jeopardy.

[18]292 P.2d at 577.

[19]People v. Serna, 43 Cal. App. 2d 106, 110 P.2d 492 (1941); People v. Stanford, 16 Cal. 2d 247, 105 P.2d 969 (1940); Hearn v. State, 55 So.2d 559 (Fla. 1951); In re Jones, 46 Mont. 122, 126 Pac. 929 (1912).

[1]221 Miss. at 266.

[2]Miss. Code Ann. § 2743 (1942).

[3]2 Vernier, American Family Laws § 138 (1932).

[4]Tourney v. Sinclair, 4 Miss. 324 (1839).

[5]Mill's Admr. v. Richard's Exr., 34 Miss. 77 (1857).

[6]Wyatt v. Wyatt, 81 Miss. 219, 32 So. 317 (1902).

customary requirements for valid contracts, are fair to both parties[7] and are not collusive.[8] The greatest difficulty with such agreements arises where they are incorporated wholly or partially into a divorce decree and there is an attempt to modify the decree. When this occurs the courts outside of this state generally base their action upon whether the agreements are merely stipulations between the parties resulting in consent decrees,[9] property settlement agreements,[10] support (or alimony) agreements,[11] or agreements combining the elements of the support agreement and the property settlement agreement.[12] Courts of several jurisdictions have held,[13] and writers dealing with the subject agree[14] that the first inquiry to be made by a court confronted with the basic problem is whether a consent decree is involved, the general rule being that consent decrees based on private stipulations as to future support are later modifiable by courts having the requisite statutory authority.[15] Where there is no consent decree involved, but where there are contractual rights touching future support, or a division of property, or both,[16] the problem becomes more complex. Where the contract is determined to be a property settlement agreement devoid of provisions for future support, the great majority of jurisdictions will not entertain a later attempt at modification by only one party.[17] Conversely, most jurisdictions have held that a contract as to future support with no property settlement provisions may be modified if it is completely merged into the final decree.[18] Where such an agreement is deemed to have been merged as to part of its terms into the final decree there is more uncertainty as to the outcome,[19] with

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[7]Warner v. Warner, 175 Miss. 476, 167 So. 615 (1936).

[8]Gurley v. Gorman, 137 Miss. 210, 167 So. 615 (1924).

[9]Adams v. Adams, 223 Ark. 656, 267 S.W.2d 778 (1954), shows that a consent decree results where ". . . the parties without making a contract that is meant to confer upon the wife an independant cause of action, merely agree upon the amount the court by its decree should fix as alimony." 267 S.W.2d at 780. See also Amis, Divorce and Separation in Mississippi, § 297 (1935).

[10]Property settlements are generally held to be an agreement whereby the husband attempts to buy off his wife's interest in his property. Such agreements may take the form of a lump sum settlement, as in Warner v. Warner, 175 Miss. 476, 167 So. 317 (1902), monthly payments in the form of an annuity as in Underwood v. Underwood, 64 So.2d 281 (Fla. 1953), or the combination of a property division and a provision for monthly payments as in Messenger v. Messenger, 297 P.2d 988 (Cal. 1956).

[11]An agreement whereby the husband attempts to buy off his wife's claim to support. Such agreements generally provide for periodic payments for an indefinite period of time as in Garlington v. Garlington, 246 Ala. 665, 22 So.2d 89 (1945).

[12]See Underwood v. Underwood, 64 So. 2d 281 (Fla. 1953); Peden v. Peden, 259 Mich. 559, 244 N.W .162 (1932); Watt v. Watt, 69 Ohio App. 322, 43 N.E. 2d 633 (1942); Bank v. Bank, 322 Ill. App. 369, 54 N.E.2d 577 (1944).

[13]Holmes v. Holmes, 186 Ark. 251, 53 S.W. 2d 266 (1936); Ragen v. Ragen, 41 Ill. App. 445, 124 N.E.2d 628 (1954); Hafner v. Hafner, 237 Minn. 424, 54 N.W.2d 854 (1952).

[14]Lacy, "Modification of Alimony Decrees Based on Settlements," 34 Ore. L. Rev. 153 (1954).

[15]Adams v. Adams,223 Ark. 656, 267 S.W.2d 778 (1954).

[16]Lacy, supra note 14.

[17]Kunc v. Kunc, 186 Okla. 297, 97 P.2d 771 (1939). See also comment, 63 Harv. L. Rev. 337 (1949) at 343.

[18]Garlington v. Garlington, 246 Ala. 665, 22 So.2d 89 (1945). See also Lindey, Separation Agreements, Ante-Nuptial Contracts, and Marriage Settlements 291 (1937). Contra, Berenberg v. Berenberg, 148 N.Y.S.2d 169 (Sup. Ct. 1956).

[19]Lindey, op.cit. supra at 389.

most jurisdictions holding for later modification.[20] The minority has advanced the theory, approved by legal scholars,[21] that the agreement and the imposed-by-law duty may exist concurrently.[22] Where the contract concerns both property settlement and future support, and is merged, partially or completely, into the final decree, it has been held that the basic question is whether or not the support payments are an inseparable part of the property settlement.[23] If the parties in a single omnibus agreement have attempted to settle all of the various claims of the wife the agreement will not be disturbed in a limited number of jurisdictions,[24] statutory powers of the divorce-granting court to modify decrees for alimony and the question of merger notwithstanding.[25] These courts hold that the fact that the payments are referred to in the contract as alimony is not controlling in construing the periodic payments as part of the property settlement.[26] Where the support provisions are clearly separable and are not interrelated with the division of property they may be later modified in those jurisdictions otherwise permitting modification of such agreements.[27]

Was the court dealing with a consent decree, a property settlement agreement, a support agreement, or a combined property settlement and support agreement in the noted case? The court stated that a consent decree was involved,[28] but from the terms of the agreement as stated in the report of the case it is indicated that the parties had in mind more than a stipulation as to alimony. If similar rulings on similar agreements may be expected it appears that in Mississippi separation agreements incorporated into a divorce decree may later be modified notwithstanding the purposes or intentions of the contracting parties.

Thomas Henry Freeland, III

Future Interests — Perpetuities — Mississippi Statute

Testator devised all of his real and personal property to his wife so long as she remained his widow, and at the expiration of thirty years from the date of the testator's death the title of all the property was to vest[1]

[20]Such agreements are modifiable: Callister v. Callister, 1 Utah 2d 34, 261 P.2d 944 (1953); Pryor v. Pryor, 88 Ark. 302, 114 S.W. 700, 166 A.L.R. 944 (1908). Contra, Law v. Law, 64 Ohio St. Rep. 369, 60 N.E. 560 (1901).

[21]Lacey, supra note 14 at 163.

[22]Miller v. Miller, 134 F.2d 583 (10th Cir. 1943); Goldman v. Goldman, 282 N.Y. 296, 26 N.E.2d 265 (1940). See also Restatement, Contracts, § 417 (c) and Pomeroy, Specific Performance § 179 (3rd Ed. 1926).

[23]Sassanoff v. Sassanoff, 120 Cal.App.2d 840, 260 P.2d 840 (1953).

[24]Dexter v. Dexter, 42 Cal.App.2d 36, 265 P.2d 873 (1954); Underwood v. Underwood, 64 So.2d 281 (Fla. 1953); Bishop v. Bishop, 162 S.W.2d 577 (St. Louis Ct. of App. 1942); Watt. v. Watt. 69 Ohio App. 322, 43 N.E.2d 633 (1942).

[25]Underwood v. Underwood, 64 So.2d 281 (Fla. 1953).

[26]Watt v. Watt, 69 Ohio App. 322, 43 N.E.2d 633 (1942).

[27]Bank v. Bank, 322 Ill. App. 369, 54 N.E.2d 577 (1944); McHan v. McHan, 59 Idaho 496, 84 P.2d 984 (1938). Annot., 166 A.L.R. 677 (1947); 15 A.L.R.2d 1255 (1951).

[28]221 Miss. at 267.

[1]The gift over to the children was not to vest title until the expiration of the thirty year period though the widow might die or remarry prior to that time.

in such of the children or lineal descendents[2] as may not have prior thereto conveyed or attempted to convey their interest or any part thereof in the estate. HELD: The thirty year limitation violates the *rule against perpetuities*[3] and the remainder vested on the death of the widow prior to expiration of the void thirty year period. *McCormack v. Blanks,* 85 So.2d 204 (Miss. 1956).

The first case shedding any real light on the "two donee statute"[4] in regard to perpetuities in this state was *Caldwell v. Willis*[5] in which the supreme court expressly recognized the common law rule against perpetuities as being in force. In a more enlightening case[6] the following year the court again recognized the rule as being in force and upheld an interest that could not possibly have been sustained had the two donee statute been construed to abrogate the twenty-one year period allowed by the common law rule. The court stated that the law[7] that was in force at the creation of the interest was simply a statutory re-enactment of the common law rule and that the only change made by the "two donee provision" of a later code was to restrict the number of lives in being to two. In *Middlesex Banking Co. v. Field*[8] the court affirmed[9] the above mentioned cases. The court, in dealing with a contested executory devise of personalty in *Thomas v. Thomas,*[10] held that the only law applicable to such an interest was the common law, and that the effect of the statute was to prohibit estates tail and authorize a statutory substitute therefore. A similar gift was upheld in *Lazard v. Hiller.*[11] However, a limitation over that would have been valid under the common law rule was declared invalid because the beneficiaries of that devise constituted third donees under the statute. Other decisions[12] have cited the common law rule alone in dealing with future interests while still others have advanced the theory that the rule is applicable to perpetuities and the statute deals only

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[2]In the event that any children should die prior to the expiration of the thirty year period their lineal descendants were to receive the share or interest of such deceased child at the expiration of the thirty years.

[3]"No interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest." Gray, The Rule Against Perpetuities, §201 (4th ed. 1942).

[4]"Estates in fee tail are prohibited; and every estate which, but for this statute, would be an estate in fee tail, shall be an estate in fee simple, but any person may make a conveyance or a devise of lands to a succession of donees then living, and upon the death of the last of said successors to any person or any heir." Miss. Code Ann. § 838 (1942). From 1857 to 1930 the proviso read: "Provided, that any person may make a conveyance, or a devise, of lands to a succession of donees then living, not exceeding two; and to their heirs of the body of the remainderman; and in default thereof to the right heirs of the donor in fee simple." Miss. Code Rev. ch. 36, art. 3 (1857); Miss. Code Rev. § 2286 (1871); Miss. Code Rev. § 1190 (1880); Miss. Code Ann. § 2436 (1892); Miss. Code Ann. § 2765 (1906); Hemingway's Code § 2269 (1917).

[5]57 Miss. 555 (1880).

[6]Cannon v. Barry, 59 Miss. 289 (1881).

[7]"[P]rovided, that any person may make a conveyance or devise of land to a succession of donees then living. . . ." Hutch. Code ch. 42. art. 1 (24) (1848).

[8]84 Miss. 646, 37 So. 139 (1904).

[9]See particularly 84 Miss. at 665-666.

[10]97 Miss. 697, 53 So. 630 (1910).

[11]145 Miss. 449, 110 So. 855 (1927).

[12]Nichols v. Day, 128 Miss. 756, 91 So. 451 (1922); Greenwood I.O.O.F. v. Hyman, 180 Miss. 198, 117 So. 43 (1937); Jones v. Burns, 231 Miss. 833, 74 So.2d 866 (1954).

with gifts to a succession of donees.[13] There can be little doubt that the court came to regard the two donee provision as amendatory of the common law by limiting the lives in being to two, for they so held in numerous cases.[14] In most instances the court was not called upon to deal with the twenty-one year period and consequently it was not mentioned. However, the court has made references to the statute as "the statute against perpetuities,"[15] "our rule against perpetuities,"[16] "the statute of this state against perpetuities,"[17] and "our statute against perpetuities,"[18] which certainly indicates that the statute was thought to be amendatory of the common law in some manner. All the cases did not stop at this point, and at least two went so far as to hold the statute a complete substitute for the common law. In *Henry v. Henderson*[19] the court stated, "[T]he purpose of the legislatue, as expressed in this statute, was to place a time limit as to when the ultimate fee was to vest, this limit to be measured, not by any certain number of years but by a definite number of lives of donees then in being, not exceeding two." In a more recent case[20] the court said, "The law gives persons the right to dispose of their own property with restraints on alienation for a limited period, but denies perpetuities or restraint for a longer period than two lives in being." This appears to have been construction placed on the statute just before and after it was amended in 1930 by removing the two donee provision. Chief Justice Sidney Smith, writing in 1929, thought that the statute differed from the common law rule in two respects. First, that the twenty-one year period was eliminated, and secondly, that the ultimate fee must vest in either the heirs of the remainderman, or an heir of the donor.[21] An article that appeared after the statute was amended to its present form stated that the only change made by the statute was the elimination of the twenty-one year period.[22] Gray[23] and Simes[24] seem to have also regarded the statute

[13]Shannon v. Riley, 153 Miss. 815, 121 So. 80 (1929), where Judge Griffith opened his opinion by stating: "The instrument is attacked from numerous points of assault as being, not in contravention of *our common law rule against perpetuities,* but in violation of our two donee statute. . . ." (Emphasis added.) In Hanie v. Grissom, 178 Miss. 108, 172 So. 500 (1937) the court upheld a gift by saying that it violated neither the rule nor the statute and in Lloyd's Estate v. Mullen Tractor & Equipment Co., 192 Miss. 62, 4 So.2d 282 (1941), the common law rule was expressly mentioned as being in force and the statute was referred to as a "special statute" which was inapplicable since the interest in question did not deal with a succession of donees.

[14]Hudson v. Gray, 58 Miss. 882 (1881); Henry v. Henderson, 101 Miss. 751. 58 So. 354 (1912); Henry v. Henderson, 103 Miss. 48, 60 So. 33 (1912); Redmond v. Redmond, 104 Miss. 512, 61 So. 552 (1913); Nicholson v. Field, 111 Miss. 638, 71 So. 900 (1916); Phillips v. Tynes, 114 Miss. 775, 75 So. 775 (1917); Biddy v. Broome, 116 Miss. 70, 76 So. 835 (1917); Reddoch v. Williams, 129 Miss. 706, 92 So. 831 (1922); Bullard v. Bullard, 132 Miss. 554, 97 So. 1 (1923); Smith v. Muse, 134 Miss. 827, 98 So. 436 (1924); Scott v. Turner, 137 Miss. 636, 102 So. 467 (1925); Norfleet v. Norfleet, 151 Miss. 790, 119 So. 307 (1928); Darrow v. Moore, 163 Miss. 305, 142 So. 447 (1932); Russell v. Federal Land Bank, 180 Miss. 55, 176 So. 737 (1937).

[15]Davenport v. Collins, 95 Miss. 358 at 374, 48 So. 733 (1909).

[16]Henry v. Henderson, 103 Miss. 48 at 69, 60 So. 33 (1912).

[17]Redmond v. Redmond, 104 Miss. at 532, 61 So. 552 (1913).

[18]Phillips v. Tynes, 114 Miss. at 785, 75 So. 775 (1917).

[19]101 Miss. at 760, 58 So. 354 (1912).

[20]Russell v. Federal Land Bank, 180 Miss. 55 at 77, 176 So. 737 (1937).

[21]Smith, "Mississippi's Odd and Confused Statute," 2 Miss. L. J. 228 (1929).

[22]Holmes, "Some Observations on Statutory Rule Against Perpetuities," 4 Miss. L. J. 122 (1931).

[23]Gray, The Rule Against Perpetuities, § 746 n.1 (4th ed. 1942).

[24]2 Simes & Smith, The Law of Future Interests, § 1437 (2d ed. 1956).

as amendatory of the common law in some manner.

A study of the Mississippi cases dealing with the statute in regard to perpetuities is nothing short of a study in confusion. It appears that there are three possible results in dealing with the present statute: (1) that it has nothing to do with perpetuities at all and is simply a statutory substitute for the fee tail which was abolished by the first clause of the statute; (2) that it is a statutory re-enactment of the common law rule; (3) that it is a complete substitute for the common law in that the period is only measured by the lives in being and the twenty-one year period is abrogated. There has never been a period in the history of the statute when the court has held firmly to any one construction. The earlier decisions seem to support the view that the twenty-one year period was unaffected by the statute while the later cases seem to support the view that the twenty-one year period was eliminated by the statute. No decision has ever expressly overruled a prior decision, but the later cases might be interpreted to have overruled by implication the cases supporting the common law period of twenty-one years. The instant case *indicates*[25] that the common law rule against perpetuities is in force in regard to realty in this state, and holds that the particular gift was bad because it would not vest within the allowable period in gross[26] of twenty-one years. Any discussion of the common law rule proper is dictum, but it is dictum of such a nature as to indicate the future thinking of the court with respect to perpetuities problems. The court is to be commended if it does, in fact, intend to have done with the irreconcilable decisions of the past.

Donald B. Patterson

Labor Law — Reinstatement — No-Strike Clause — Strike Precipitated by Unfair Labor Practice

Petitioner's collective bargaining contract with the union contained a "no-strike" provision[1] for the duration of the pact. The union gave notice that it wished to modify the contract sixty days prior to its expiration, pursuant to the National Labor Relations Act.[2] During this period, petitioner's unfair labor practices precipitated a strike. Petitioner refused reinstatement and the union applied to the National Labor Relations Board which ordered reinstatement and back-pay.[3] The Court of Appeals affirmed,[4] and the Supreme Court granted certiorari. Held:

[25]By referring to 41 Am. Jur., Perpetuities and Restraints on Alienation § 3 (1939), which embraces the twenty-one year period; but it is to be noted that the Perpetuities question was *conceded* on appeal.

[26]Simes, Future Interests, § 1225 (2nd ed. 1956). "If the instrument suggests no lives in being which may be the measure of the period of vesting, then the future interest must vest within twenty-one years."

[1]The contract provided, "The union agrees that during the term of this agreement there shall be no interference of any kind with the operations of the employer, or any interruption or slackening of production of work by any of its members. The union further agrees to refrain from engaging in any strike or work stoppage during the term of the agreement."

[2]49 Stat. 449 (1935), as amended, 29 U.S.C. § 158 (d) (1947).

[3]103 N.L.R.B. 511 (1953).

[4]214 F.2d 462 (2d Cir. 1954); accord, NLRB v. Wagner Iron Works, 220 F.2d 126 (7th Cir. 1955).

The collective bargaining contract containing a "no-strike" provision is not breached where the strike is directed toward employer unfair labor practices. Further, § 158 (d)[5] of the amended Act[6] does not deprive individuals of their "employee" status where they engage in a strike during sixty day "cooling off" period as a consequence of employer unfair labor practices. *Mastro Plastics Corp. v. National Labor Relations Board,* 76 S. Ct. 349 (1956).

Only "employees"[7] are eligible for reinstatement under the Act and such status is generally lost when an individual is discharged for cause.[8] Cause for discharge exists where workers strike for economic reasons during the tenure of a contract containing a "no-strike" clause,[9] the clause constituting a waiver of the union's right to strike for economic purposes. However, employer unfair labor practices normally provide an adequate basis for a strike under which employee status is retained.[10] Thus, the first problem facing the Court was to reconcile an employee "no-strike" guarantee with an employer unfair labor practice. The Court unanimously rejected the petitioner's contention that the "no-strike" clause covered all strikes,[11] stating it waived only the right to strike for economic purposes. This ruling appears correct in light of the declared policy of the Act[12] and the fact that the union is rendered helpless against employer abuses should petitioner's contention be sustained.[13] A much sharper problem arises, however, when the facts of the instant case are considered in light of the sixty day "cooling off" provision of § 158 (d)[14] of the amended Act. Here the Court divided 6-3,[15] holding, as stated,

5". . .where there is in effect a collective bargaining contract covering employees in an industry affecting commerce. . .no party to such contract shall terminate or modify such contract unless the party. . .(1) serves written notice upon the other party. . .of the proposed termination or modification sixty days prior to the expiration date thereof. . .(4) continues in full force and effect without resorting to strike or lockout, all the terms. . .of the contract for a period of sixty days. . . . Any employee who engages in a strike within the sixty day period . . . shall lose his status as an employee . . . for the purposes of sections 8, 9, and 10 of this Act. . . ." 29 U.S.C. § 158 (d) (1947).

661 Stat. 136, 29 U.S.C. §§ 141-197 (1947).

7Under the Act, the pertinent definition of an employee includes, ". . .any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute, or . . . unfair labor practice. . . ." §2 (3) 49 Stat. 449, (1935), 29 U.S.C. § 152 (3) (1952).

849 Stat. 449 (1935), as amended, 29 U.S.C. § 160 (c) (1947).

9See Dyson & Sons, 72 N.L.R.B. 445 (1947); Scullin Steel Co., 65 N.L.R.B. 1294 (1946), enforced as modified, 161 F.2d 143 (8th Cir. 1947).

10Before amendments see, Poultrymen's Service Corp., 138 F.2d 204 (3rd Cir. 1943); NLRB v. Remington Rand Inc., 130 F.2d 919 (2d Cir. 1942); NLRB v. Moore-Lowry Flour Mills Co., 122 F.2d 419 (10th Cir. 1941); NLRB v. Boss Manufacturing Co., 107 F.2d 574 (7th Cir. 1939). Since the 1947 amendments see NLRB v. West Coast Casket Co., 205 F.2d 902 (9th Cir. 1953); NLRB v. Kobritz, 193 F.2d 8 (1st Cir. 1951).

1176 S. Ct. at 358, 362.

12"It is hereby declared to be the policy. . .to eliminate the causes of certain obstructions to the free flow of commerce. . .by encouraging the practice. . .of collective bargaining. . .and by protecting the exercise by workers of full freedom of association. . . ." § 1, 49 Stat. 449 (1935). The Court in the instant case stated that, "Only after that is assured can the parties turn to effective negotiations as a means of maintaining the normal flow of commerce. . . ." 61 Stat. 137, 29 U.S.C. §151 (1952).

13"That interpretation would eliminate for the whole year the employees' right to strike, even if petitioner, by coercion, ousted the employees' lawful bargaining representative and, by threats of discharge, caused the employees to sign membership cards in a new union. . . ." 76 S. Ct. at 358.

14 See note 5 supra.

15Frankfurter, joined by Minton and Harlan, dissented. 76 S. Ct. at 361.

that the section was not applicable to strikes precipitated by employer unfair labor practices. Disregarding the "no-strike" clause, a literal reading of the section would appear to deprive the strikers of their employee status. Further, as the dissent points out,[16] the section is purposeless if not applied to employer unfair labor practices, as it was clearly settled before the amendments that the Board could not order reinstatement where participants in an economic strike were replaced.[17] The majority opinion recognizes this argument[18] but states that Congress in using the words "terminate or modify"[19] in reference to the sixty day period intended to confine the section to economic strikes; and since the collective action taken in the instant case was not aimed at terminating or modifying the contract but to protest against unfair labor practices, the section is not applicable. Also the majority felt that the dissent's construction of the section is contrary to the policy of the Act stating that any limitation on the employee's right to strike against employer unfair conduct, "must be more explicit and clear than it is here in order to restrict them at the very time it may be most needed."[20]

Both arguments are plausible and neither can be said to be an unreasonable interpretation of the section. Legislative history sheds no light on the problem.[21] It seems clear that the section as now construed adds nothing to the Act and is only declaratory of law existing prior to the amendments; but it does not necessarily follow that it was badly construed. Legislators often codify court decisions. Though both views are reasonable, it would seem that the majority approach is more acceptable if one agrees that the purpose of the Act is to maintain harmonious labor relations[22] and to guarantee workers the right to concerted action. Such purpose should preclude court construction creating a loophole which permits offensive conduct to go unchallenged.

Jack F. Dunbar

Labor Law — Union Acting as Employer Not Subject to Charges of Unfair Labor Practices

A union, representing office and clerical employees, filed charges of unfair labor practices against a group of other organizations, mostly unions, for violations of the National Labor Relations Act in respect to their office and clerical employees. The trial examiner found that the respondent union was an employer within the meaning of section 2 (2)[1] of

[16] 76 S.Ct. at 364-365.

[17] See NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1937); NLRB v. Fansteel Metallurgical Corp., 306 U.S 240 (1938); NLRB v. Sands Mfg. Co., 306 U.S. 332 (1938); Local 133, AFL, v. NLRB, 219 F.2d 874 (8th Cir. 1955).

[18] 76 S.Ct. at 360.

[19] See note 5 supra.

[20] 76 S. Ct. at 360.

[21] S. 105 (minority), pt. 2, 80th Cong., 1st Sess. 21-22 (1947), makes it clear that the committee was aware that the instant problem might arise. The majority report made no reply to the minority observation.

[22] See the declared policy of the Act, note 12 supra.

[1] "The term 'employers' includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." 49 Stat. 451 (1935), 29 U.S.C. § 152 (2) (1952).

the NLRA and was thereby subject to section 8 (a)[2] of the Act. The National Labor Relations Board reversed and dismissed the complaint upon the grounds that the purpose of the Act would not best be effectuated by assertion of jurisdiction, although the Board agreed with the trial examiner that a labor union is an employer with respect to its own employees. The complaining union petitioned for review. HELD: The Board did not abuse discretion in determining that, while a union was an employer in relation to its office and clerical employees, it was a non-profit organization engaged in non-commercial activities, and that the purposes of the Act would not best be effectuated by asserting jurisdicion. *Office Employees International Union Local 11 v. NLRB,* 235 F.2d 832 (D.C. Cir. 1956).

This case is unique in that it is the first proceeding to be decided by the Board in which a labor organization has been charged with committing unfair labor practices in dealing with its own employees. However, the Board had in a prior case assumed jurisdiction in a representation matter involving a union and its employees.[3] The Board applied the same test to the union here as it would have applied to any other employer in determining jurisdiction.[4] The procedure is to determine first whether the employer meets the basic (in terms of volume of business) jurisdictional requirements prescribed by the Board, and in the instant case these requirements were met without any difficulty.[5] But the second step is to determine whether the purposes of the Act would be effectuated by asserting jurisdiction, and here the Board refused to assert its discretionary jurisdiction.[6] The reasoning was that the unions complained against were non-profit organizations and that jurisdiction is asserted over such organizations "only in exceptional circumstances and in connection with purely commercial activities of such organizations."[7] However, the following question appears: Did Congress by the language of section 2 (2)[8] intend to make it mandatory for the Board to assume jurisdiction in cases where a union is acting as an employer? The only insight into this question is to examine the legislative history of the NLRA in respect to section 2 (2). In 1934 the Senate Labor Committee, in reporting the original Wagner Act, proposed to modify the blanket exclusion of unions from the definition of "employer" by inserting the language as it appears in the Act today including labor unions as an employer "when acting as an employer".[9] The reason for the change was

[2]49 Stat. 452 (1935), 29 U.S.C. § 158 (a) (1952). Pertains to employer unfair labor practices.

[3]Air Line Pilots Ass'n., 97 N.L.R.B. 929 (1951) in which the Board said, "It seems clear that the Congress intended that labor unions be treated like any other employer with regard to their own employees." The Board in the instant case expressly overruled this case.

[4]See, e.g., Oregon Teamster Security Plan Office, 113 N.L.R.B. 987 (1955). The test used by the Board was ". . . Whether they are engaged in commerce or activities affecting commerce, and if so, would the policies of the Act be best effectuated by taking jurisdiction over them."

[5]See 113 N.L.R.B. at 989.

[6]See NLRB v. Indiana & Michigan Electric Co., 318 U.S. 9, 87 L.Ed. 579 (1943); NLRB v. Newark Morning Ledger Co., 120 F.2d 262 (3d Cir. 1941).

[7]Quoting in the instant case from H.R. 510, 80th Cong., 1st Sess. § 32 (1947).

[8]Supra note 1.

[9]See supra note 1.

given by the committee.[10] After the 1934 bill was not acted upon, the same Senate committee in reporting the 1935 bill, which was subsequently passed, made a report identical[11] to the one made the preceding year. The statement made by the Committee in addition to the fact that nowhere is there really any strong language otherwise, would seem to indicate that there is some question as to whether or not Congress intended that the Board's jurisdiction be discretionary.

The Board's decision, thus, conceivably can be criticized on three grounds: (1) that Congress by the language of section 2 (2) made it mandatory for the Board to assume jurisdiction; (2) that the unions are not properly non-profit organizations; and (3) that even so there was an abuse of discretion. The first line of criticism is doubtful, but possible. As to the second, it is probable that the union in the instant case is inaccurately termed "non-commercial" in view of the fact that the union well met the minimum board-prescribed standard for being "engaged" in interstate commerce. And as to the last, the Board, by refusing to assert jurisdiction, is allowing a labor union to commit the same unfair labor practices that all other employers are prohibited from committing. It is submitted that the instant case unduly deprives employees of unions of a remedy against unfair labor practices of the union, and is not conductive to the best relations between labor and management because of the double standard applied.

Joe W. Hobbs

TORTS — WRONGFUL DEATH — MINOR SUES FATHER FOR DEATH OF MOTHER

An unemancipated minor child brought a suit in tort under Mississippi's wrongful death statute[1] against her father for the death of her mother, charging defendant with negligent operation of an automobile. Defendant demurred, and the demurrer was sustained. Plaintiff appealed to the Mississippi Supreme Court. HELD: Affirmed. The common law rule[2] precluding a minor child from suit against its parent for tort has not been abrogated by the wrongful death statute. *Durham v. Durham,* 85 So. 2d 807 (Miss. 1956).

There is a judicially recognized policy of maintaining domestic tranquility, consequently, one spouse cannot sue the other in tort under

[10]This reason as found in the Board compilation of the Legislative History of the NLRA, p. 1102 (1935), quoting from the Senate Labor Committee Report (1934), is: "The reason for stating that 'employer' excludes any labor organization, other than when acting as an 'employer' is this: In one sense every labor organization is an employer, it hires clerks, secretaries and the like. In its relations with its own employees, a labor organization ought to be treated as an employer, and the bill so provides. But in relation to other employees, it ought not to be treated as an employer, and ought to have the right to use lawful means to induce employees to join the organization."

[11]See Board compilation of Legislative History of NLRA, 1935, p. 2305.

[1]Miss. Code Ann. § 1453 (1942).

[2]It is quite debatable if there was such a rule at early common law. In deciding Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930), Chief Justice Peaslee wrote a good history on this point of law and he concluded by saying: "There never has been a common law rule that a child could not sue its parent."

normal circumstances.[3] But, where the tort results in death, the question arises concerning the effect of this immunity upon a suit predicated upon a wrongful death statute.[4] The majority of courts hold that the immunity between the deceased and the defendant persists so as to preclude the death action by *any* party plaintiff.[5] But a minority[6] – Mississippi included[7] – holds otherwise. Further, wrongful death aside, an unemancipated minor child cannot sue its parent in tort.[8] This rule was established in *Hewlett v. George,* a Mississippi case decided in 1891.[9] Though a majority of jurisdictions have followed the Mississippi rule, the trend today is in the direction of diluting the rule through exceptions, as where there is an intentional tort,[10] or where suit is against the estate of the parent,[11] or where there is liability insurance.[12] In the case of *Dunlap v. Dunlap,*[13] New Hampshire refused to recognize absolute parental immunity from suit by a child.[14] That Court recognized the fact that where liability is upon an insurance company, the domestic situation is not involved, and there is no reason to bar an action. The trend in the United States is to follow the New Hampshire rule.[15]

In future cases on the point, Mississippi should take cognizance of the trend in the other jurisdictions mitigating absolute parental non-liability. This would allow a child to sue its parent under certain recognized exceptions. The foremost of these exceptions are: cases involving an intentional tort by the parent, where domestic tranquility is deemed to be destroyed, and cases involving an unintentional tort where ultimate

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[3]Ensminger v. Ensminger, 77 So. 2nd 308 (Miss. 1955). See also Prosser, Torts 901 (1941).

[4]See, e.g., Miss. Code Ann., § 1453 (1942). The troublesome words are: "caused by . . . act . . . as would if death had not ensued have entitled the party injured to maintain an action. . . ."

[5]Dishon's Adm'r v. Dishon's Adm'r, 187 Ky. 497, 219 S.W. 794 (1920); Wilson v. Barton, 153 Tenn. 250, 283 S.W. 71 (1926); Wilson v. Brown, 154 S.W. 322 (Tex. Civ. App. 1913); Keister's Adm'r v. Keister's Ex'rs, 123 Va. 157, 96 S.E. 315 (1918).

[6]Robinson's Adm'r v. Robinson, 188 Ky. 49, 220 S.W. 1074 (1920); Albrecht v. Potthoff, 192 Minn. 557, 257 N.W. 377 (1934); Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 Atl. 663 (1936).

[7]Deposit Guaranty Bank and Trust Company v. Nelson, 212 Miss. 335, 54 So. 2d 476 (1951).

[8]This is recognized as "The Common Law Rule." McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903).

[9]A minor daughter was precluded from bringing suit against her parent for having her falsely imprisoned: "The peace of society . . . and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent." 68 Miss. 703, 9 So. 885 (1891).

[10]See, e.g., Manhnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951).

[11]Davis v. Smith, 126 Fed. Supp. 497 (E.D. Pa. 1954), where a minor son was permitted to sue in negligence his father's estate

[12]Lusk v. Lusk, 113 W. Va. 17, 116 S.E. 538 (1932). The court reasoned that the action was not unfriendly between the parent and child.

[13]84 N.H., 352, 150 Atl. 905 (1930). The Court recognized that liability had shifted from the parent to the parent's insurance company, and that allowing the child to bring suit against its parent would in no way tend to disturb domestic tranquility.

[14]Mississippi still recognizes absolute parental immunity from suit by minor child. Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891).

[15]Federal Judge Lord of the Eastern District of Pennsylvania gives a very good summary of this trend in deciding the case of Davis v. Smith, 126 Fed. Supp. 497 (F.D. Pa. 1954). See also Jones, "Have I Left Anything Out?" in Trial and Tort Trends 39 (Appendix 1955).

liability is upon a third person, usually an insurance company. But, before Mississippi could recognize the latter exception, evidence of insurance would have to become admissible in her courts.[16] All these considerations aside, it is submitted that under *present* Mississippi law, the personal representative of the deceased *might* have prevailed against the demurrer,[17] had he instigated the instant action rather than the child.

Paul H. Holmes

WORKMENS COMPENSATION — ARISING OUT OF EMPLOYMENT — ASSAULT

Deceased Devlin was shot by Searles, his employer, while working at night after hours. After he had shot Devlin, Searles committed suicide. There was evidence to the effect that Searles was suffering from alcoholic paranoia. There was also evidence tending to show that Searles was motivated by his jealousy of Devlin's relationship with a third party woman. The heir of the deceased employee appealed from the finding of the Industrial Accident Commission on an application for compensation. The action was defended by the administrator of the estate of the employer and by the insurer. HELD: Applying the law of assaults by third parties, that the shooting did not arise out of the employment, although it occurred in the course of the employment. *Devlin v. Ennis,* 29 P.2d 469 (Idaho 1956).[1]

Forty-one states have adopted the conjunctive formula for coverage

[16] M & A Motor Freight Lines v. Villere, 190 Miss. 848, 1 So. 2d 788 (1941); Herrin v. Daly, 80 Miss. 340, 31 So. 790 (1902).

[17] (a) According to Miss. Code Ann., § 1453 (1942) and Southern Pine Electric Power Association v. Denson, 214 Miss. 397, 57 So. 2nd 859 (1952), such a party might have brought this suit.

(b) On the authority of Deposit Guaranty Bank and Trust Company v. Nelson, 212 Miss. 335, 54 So. 2d 476 (1952), the *original* (husband-wife) relationship did not preclude the action: "First, the disability of the wife to sue is one personal to her, and does not inhere in the tort itself. The assault upon her is wrongful even though she is under a personal disability to sue. The reasons for the rule of immunity between husband and wife do not exist where the husband kills his wife and thus destroys the marital relationship. Second, the statutory beneficiary has a new cause of action, independent of that of the deceased if she had survived, provided the defendant is chargeable with a wrongful act. The suit is derived from the tortious act not from the person of deceased. And third, the stated condition in the statute has no reference to the person entitled to sue but only to the sufficiency of the circumstances attending the injury and the nature of the wrongful act. That is, the defendant must be chargeable with a wrongful act." 54 So.2d at 476.

And this case was cited with approval in the instant case as follows: "The relationship between the deceased and defendant was that of husband and wife, and the wife could not have sued for her injuries had she survived the accident. . . . But that relationship does not preclude this action if there is no impediment to the suit arising from the relationship between the plaintiff and defendant. Deposit Guaranty Bank & Trust Co. v. Nelson. . . ." Durham v. Durham, 85 So. 2d at 807 (Miss. 1956).

(c) Thus, if the *second* (parent-child) relationship were removed from the case, the result *might* be different.

[1] Anderson, J., with Keeton and Porter, JJ. concurring. Smith, J. and Taylor, C. J. dissented on the grounds that the commission should have made a determination on the insanity question. The minority held that the evidence established the assailant as an alcoholic paranoiac; therefore, the claimant should have been compensated on the theory of an assault by an insane third person. See note 17 infra.

under Workmens Compensation: "arising out of and in the course of employment".[2] It has been held that the two tests are to be applied independently and that both must be met to obtain coverage.[3] Generally, an injury is received in the course of employment when it is inflicted while an employee is doing the acts which he is employed to do, or while doing an act which is incidental to the employment. It arises out of the employment when there is a causal connection between the conditions inder which the work is required to be performed and the resulting injury.[4] "In the course of" refers to time, place and circumstances, while "arising out of" relates to the cause or origin of the accident.[5] Some Workmens Compensation Acts specifically provide that assaults shall be covered,[6] while others, by judicial interpetation, have been extended to cover assaults.[7] An assault is an accident for Workmens Compensation purposes when, although intentionally caused by a third person, it is unexpected and without design from the claimants point of view.[8] Assaults are considered to arise out of the employment if the nature[9] or the environment[10] of the work has accentuated the risk of an assault. Although there is some authority to the contrary,[11] it is generally held that the employer need not foresee the accentuated risk. Most jurisdictions hold that an injury does not arise out of the employment if the claimant is the aggressor.[12] A small minority holds otherwise.[13] Assaults that grow out of arguments over work or incidents to the work are held to be compensable.[14] Assaults motivated by circumstances other than the employ-

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[2]Miss. Code Ann., § 6998-02 (2) (1942).

[3]Ward & Gow v. Krinsky, 259 U.S. 503, 66 L. Ed. 1033 (1922).

[4]McNichols Case, 215 Mass. 497, 102 N.E. 697 (1913).

[5]January-Wood Co. v. Schumacker, 231 Ky. 705, 22 S.W.2d 117 (1929).

[6]See note 2 supra.

[7]"Generally speaking injuries sustained by an employee while in the course of his employment, as the result of an assault upon his person by another, or by a third person, no question of the injured employee's own culpability being involved, are compensable where from the evidence presented a rational mind is able to trace the injury to a cause set in motion by the nature of the employment, or some condition, obligation or incident therein, and not by some other agency." 6 Schneider, Workmens Compensation, § 1560 (1952).

[8]W. B. Davis & Son v. Ruple, 222 Ala. 52, 130 So. 772 (1940); U.S.F. & G. v. Barnes, 182 Tenn. 400, 187 S.W. 610 (1945); Stasmos v. State Industrial Comm'n, 80 Okla. 221, 195 Pac. 762 (1921).

[9]Newspaper employee stabbed at 2 a.m. while collecting money from newsstands. Gargano v. Essex County News, 129 N.J.L. 369, 29 A.2d 879 (1943). A bartender was struck in the eye by a glass thrown by a drunken patron. State ex rel Anseth v. District Court, 134 Minn. 16, 158 N.W. 713 (1916).

[10]Employer's plant was located in a district of a large city where a considerable amount of crime had taken place. Hanson v. Robitshek-Schneider Co., 209 Minn. 596, 297 N.W. 19 (1941). The manager of a boarding house which was frequented by unsavory characters was assaulted. Israel v. Ramble Properties Inc., 58 Misc. 376, 58 N.Y.S. 2d 388 (Sup. Ct. 1945).

[11]Schmoll v. Weisbrod & Hess Brewing Co., 98 N.J.L. 150, 97 Atl. 723 (1916); Johnson v. Guggenheim Packing Co., 168 Kan. 702, 215 P.2d 178 (1950).

[12]Kimbro v. Black & White Cab Co., 50 Ga. App. 143, 177 S.E. 274 (1934); Fischer v. Industrial Comm'n, 79 Ill. 96, 96 N.E.2d 487 (1951).

[13]Newell v. Moreau, 94 N.H. 439, 55 A.2d 476 (1947); Hartford Accident & Indemity Co. v. Cardillio, 112 F.2d 11 (D.C. Civ. 1940).

[14]President of a hatchery company was shot by a delegate while acting as the president and a member of the board of directors of an international association of chick hatcheries. Bersche v. Industrial Comm'n, 56 Ohio App. 236, 10 N.E.2d 285 (1937).

ment are not compensable.[15] Assaults by insane persons,[16] drunkards,[17] and animals[18] have been held to arise out of the employment. Some courts hold that there must be a causal connection between the employment and the injury,[19] while other courts hold that there must be a reasonable relationship between the employment and the injury.[20] The Mississippi court in *Mutual Implement and Hardware Insurance Co. v. Pittman* held; "where any reasonable relation to the employment exists or the employment is a contributory cause, the court is justified in upholding an award as 'out of' the employment."[21] The court in this case also adopted the "industrial contact theory".[22]

The principal case contains a good analysis of the problems involved in the determination of compensability in cases of assaults by third persons, but it evades close analysis of the relationship of employer-employee. Although the hostility, between Devlin and Searles, may have originated from a source outside of the employment, Searles' position as employer would allow him, at least, to know that Devlin would be working on the particular night and allow him access to the building to carry out the shooting. Although it is a factual determination, the employment in the principal case would seem to be at least a concurrent cause of the shooting. Moreover, the "industrial contact theory" might and should have been extended to govern compensation for injuries arising out of disputes between employer and employee.[23]

Harry L. Schroeder

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[15]A teacher in a rural school district was criminally assaulted while walking through a wooded section on her way from school to her boardinghouse. Common School District v. District Court, 140 Minn. 470, 168 N.W. 555 (1918). An employee guarding his employer's property was injured during a holdup in which the criminals wanted only the contents of his pockets. Bryden v. Industrial Accident Comm'n, 62 Cal. App. 3, 215 Pac. 1035 (1923).

[16]A chauffeur while driving his employer's car was stabbed by an insane man. The fact that everyone is exposed to such danger does not defeat compensation. Katz v. Kadans, 232 N.Y. 420, 134 N.E. 330 (1922). A chef in a restaurant was stabbed while in the kitchen through which customers frequently passed. Hartford Accident & Indemnity Co. v. Hoage, 85 F.2d 417 (D.C. Cir. 1936).

[17]"If the jury . . . should find appellant's assailant so highly intoxicated he didn't know what he was doing, his acts would fall in the same category as those of an insane man, whether fellow employee or not. . ." Perez v. Fred Harvey, Inc., 54 N.M. 339, 224 P.2d 524 (1950).

[18]Corcoran v. Teamsters & Chauffeurs Joint Council, 209 Minn. 289, 297 N.W. 4 (1941); Barton v. Skelly Oil Co., 47 N.M. 127, 138 P.2d 263 (1943).

[19]Ex Parte Coleman, 211 Ala. 248, 100 So. 114 (1924); Pacific Employers Insurance Co. v. Industrial Accident Comm'n, 19 Cal.2d 622, 122 P.2d 570 (1942).

[20]Cudahy Packing Co. v. Parramore, 263 U.S. 418, 68 L. Ed. 366 (1923); Brookhaven Steam Laundry v. Watts, 214 Miss. 569, 59 So.2d 381 (1952).

[21]214 Miss. 223, 59 So.2d 547 (1952).

[22]The theory recognizes that the constant contact of fellow employees during the course of employment will in itself cause some disputes. By the use of this theory, such fracases are found to arise out of the employment.

[23]See note 21 supra.

RECENT BOOKS

CONTRACTS AND CONVEYANCES OF REAL PROPERTY. By Milton R. Friedman. Chicago: Callaghan & Company, 1954. Pp. 425. $4.25

The importance of real estate conveyancing should be apparent to the general practitioner of law. Real estate transactions form an integral part of the practice of the average lawyer. Surely there is no substitute for experience in the field. Just as surely, however, one must augment practical experience by a background of scholarship, if technical competence is to be realized.

The author states: "This book was written by a practitioner for practitioners in the field of real estate conveyancing, with the aim of considering not only what one should know in this field, but also what one should do or not do, and why."

The book is narrow in scope, dealing with contracts and conveyances relative to real property. It is comprehensive, covering many minor points which are wont to cause concern to the experienced as well as the inexperienced attorney. The approach is a mixture of the practical and the academic; its language is authoritative, yet not pedantic. Altogether, the style, for a legal text, is refreshingly straightforward.

The book is divided into eleven chapters, the first being "Contracts of Sale". In this chapter, there is a realistic treatment of binders, memoranda, incomplete contracts, and conditional contracts of sale.

Chapter 2 covers the "Assignment of Contracts of Sale", nominees and straw men, fraud, reformation and recission, and subcontracts.

Chapter 3 deals with "Examination of Title". Certainly there are complete works on this particular topic, but it would be difficult to find a more substantial treatment.

Chapter 4 is devoted to a study of "Marketable Title", which the author defines as: "One free of encumbrances and free of any right or interest in a third person which is incompatible with full enjoyment and ownership of the property." Approximately 150 pages of knowledgeable discussion, abundantly and authoritatively footnoted, covers adverse possession, lapse of time, burden of proof, estoppel, judicial determination, encumbrances, easements, condemnation, risk of loss, restrictions, party walls, encroachments and projections.

Chapter 5 is a short and general discussion of possession.

Chapter 6 treats "Mortgages": the two types (existing and purchase money); how to dispose of an existing mortgage at the closing, with an excellent discussion of the distinction between assumption of mortgage and making the conveyance subject to the mortgage, and the results in each instance.

Chapter 7 covers "The Deed", from required form, execution, acknowledgement and authentication, to deed stamps.

Chapter 8 goes into "Closing Adjustments" in some detail. Their importance to both seller and buyer is emphasized, for the expenses of operation of real estate, as well as income, accrue from day to day, and include taxes, insurance, mortgage interest, utilities and other items. They may continue despite a sale of property. The author points out that there is a surprisingly small amount of law relevant to closing adjust-

ments, or discussion thereof in legal literature. The advice of disposition of these matters, together with recommended procedures which he outlines, typifies the practical value of the book.

Chapter 9 presents a short discussion of "Adjournment or Delay in Closing", with recommended procedures to cover these events, from the standpoint of the seller in possession, and of the buyer in possession.

Chapter 10 deals with "Medium of Payment". The author points out the risks involved in accepting an endorsed check in payment, suggests better methods of payment, and stresses the need for having the contract of sale recite the method of payment. Again, he sets out the details of his suggested methods of payment.

Chapter 11 is devoted to "The Closing", including preparation for the closing, instruments and papers to be delivered at the closing, the closing statement, and the conduct of the closing. This chapter presents the advisability of preparing a check list of things to be done prior to the closing, giving a suggested list; sets out a detailed closing statement, one of the few detailed forms in the book; and suggests an order of procedure for closing.

The appendix presents "Customs in Respect to Title Closings" as recommended by The Real Estate Board of New York, Inc., which should prove valuable to the loan closer in deciding which items should be paid by the seller and which should be paid by the buyer.

The Table of Cases covers 44 pages, which is some indication of the exhausting footnotes to be found in the book. Each case is referenced to a specific section or sections of the book. There is an adequate index (topical), and a 1955 cumulative supplement (pocket part).

In my opinion, the author has attained his goal. He has written a book for practitioners in the field of real estate conveyancing. I recommend it, also, to the general practitioner.

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HANDBOOK OF THE LAW OF EVIDENCE. By John Evarts Tracy. New York: Prentice-Hall, Inc., 1952. Pp. 382. $5.65

This volume is true to its title as a handbook. Mr. Tracy has run the gamut from trial by battle to trial by administrative agency. There is very little in the book that goes beyond the surface (with some notable exceptions) yet there appears to be no phase of the law of evidence which does not receive mention.

As do apparently all textbooks on evidence the work begins with presumptions. But Mr. Tracy treats presumptions as being a means of dispensing with proof in a trial rather than as abstract principles of law governing admissibility and proof. This idea and scheme seems to permeate the book—the idea that the problem is immediately before you in a courtroom and the necessity of a quick and accurate answer is upon counsel and court alike.

Admissions in pleadings are handled in a manner calculated to demonstrate the real value of admissions both judicial and extrajudicial. Too often the advocate loses sight of the value of admissions in pleadings and

admissions by counsel as an integral part of the proof of his case. The author offers several suggestions toward eliminating this oversight.

Judicial notice is gone into in some detail, but the reviewer cannot say that the detail is burdensome or not in keeping with the rest of the work. In this one respect this book appears to be more than simply a handbook.

The use of documentary evidence is fully explained together with the methods of authentication of written instruments, and several of the uses and abuses of written instruments are discussed.

Most of the aspects of the law of evidence as concerns witnesses are dealt with: a person's religion or the lack of it; the interest of witnesses; mental capacity; intoxication; privilege; and self incrimination. The credibility and impeachment of witnesses is a subject of a portion of the book and some pointed illustrations are given with reference to the proof of reputation and the showing of bias and interest.

As is its rightful place in any discussion of the law of evidence the question of hearsay occupies a large portion of the work. Many aspects of the law of evidence concerning hearsay are dealt with briefly and sometimes, too briefly, but as is always the case in a handbook, the subject can never quite be covered to the extent that the reader would often like.

It could hardly be said that this handbook would be of great value to the experienced trial practitioner and it is somewhat difficult to imagine the actual use of this book in a courtroom where the situation confronts the advocate, but as a basis of review for examinations and as leisurely reading for the young, inexperienced lawer it certainly is of great value. In the reviewer's opinion it meets the tests for a handbook.

Howard C. Ross, Jr.
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SUCCESSFUL APPELLATE TECHNIQUES. By John Appleman. Indianapolis: The Bobbs-Merrill Company, Inc., 1953. Pp. 1081, with 1954 Supplement. $17.50

Mr. Appleman is a seasoned attorney of many years experience. From his vast store of knowledge and years of experience he has ably written for the use of the legal profession, in addition to the book under review, a twenty-five volume set, *Insurance Law and Practice;* a one volume, *Automobile Liability Insurance;* a one volume, *Successful Jury Trials;* a two volume, *Preparing and Trying Cases in Illinois;* a one volume, *Illinois Dramshop Briefs;* and a one volume, *Military Tribunals and International Law.*

It is elementary that a successful appeal has its foundation in the trial court. There the attorney must preserve for review the points upon which he will rely in the higher court. As is said by the author, "There can be no appeal unless there is a record upon which to base it." After laying the foundation of an appeal the next step is to procure an accurate and full transcript of the proceedings in the lower court. In Part I of his book, Mr. Appleman, in plain, clear, and concise language, discusses the

many problems facing the attorney removing a case from the trial to the appellate court: the necessity of preserving in the lower court points upon which the appeal is to be prosecuted; the importance of motions for a new trial, or for judgment notwithstanding the verdict or in arrest of judgment; the time within which the appeal can be taken; the preparation and verification of the transcript to be used on appeal; and other matters, too numerous to mention here.

Part I of Mr. Appleman's book is made up of two chapters. The first deals with the record and procedural steps; the second, with the abstract of the record. The former contains ninety-eight pages, and the latter three hundred fifty pages. The greater part of the second chapter is made up of illustrative forms. For the average Mississippi lawyer this chapter, while interesting, deals with matters foreign to our practice.

Part II—The Brief. Mr. Appleman, in the introduction of his book, very aptly says, "No lawyer can tell another attorney how to win any given case upon appeal." So it is that no lawyer can tell another how to write a brief, nor how to present a case on appeal. But there are certain cardinal principles applicable to the preparation of a brief which, if followed, will result in presenting the issues in the best possible light. Mr. Appleman has very interestingly and ably discussed these principles in Part II of the book. This he divides into twelve chapters, in each of which he discusses the various aspects of a brief.

This section begins with a discussion of the principles of brief writing. Here Mr. Appleman discusses such subjects as basic preparation; legal research; selecting the angle of attack or defense; weeding out the immaterial; the human aspects of appellate practice; preparing the brief; creating an interesting brief, stylistic matters; and the delicate nuances of brief writing. His approach to these matters emphasizes the fact that he is well qualified from a practical standpoint to deal with the matter of brief writing. Many worthwhile suggestions are made in this chapter of the book. Mr. Appleman presents them in a clear, concise, and understandable manner. One will find this chapter most helpful.

In Chapters 4 through 10 of Part II, Mr. Appleman discusses the brief in its entirety from cover to conclusion. Chapter 4 is made use of to point out the necessity for a proper cover. In Chapter 5 Mr. Appleman discusses the index, its purpose, and form.

It is important that the appellate court have a true picture of the circumstances surrounding the issue involved. Mr. Appleman's discussion in Chapter 6 of the problems confronting the attorney in preparing a statement of facts for the brief is more than adequate.

In Chapters 7, 8, 9, and 10, Mr. Appleman discusses other aspects of the brief—errors assigned; propositions of law; the argument; and the conclusion. In discussing errors to be assigned on appeal he points to the desirability of limiting them to errors of substantial character, and to the evils of making a "shotgun" approach. He says, "It is true the court will form its first impression from the facts; but it is from the assignment of errors that it will judge whether or not relief should be granted. Because of this, the utmost skill is required in the expression of these errors." In this regard Mr. Appleman lays down several blanket rules for preparing the assignment of error. He says that it should "demonstrate the action, the error, and prejudice."

In "Propositions of Law" (Chapter 8, Part II), the author calls at-

tention to the importance of this section of a brief. The two methods used—the "discussive" and the "citations"—are discussed and compared. He makes observations and suggestions which will be of assistance in the preparation of legal propositions.

In Chapter 10, Part II, Mr. Appleman discusses the "Argument" of a brief. He calls attention to the desirability, if not the necessity, of a proper organization of the material to be presented and of linking the argument with the other sections of the brief. In dealing with the argument Mr. Appleman refers to and comments on the use of quotations, the number and quality of citations, the reference to evidentiary matters, diction, dealing with legal precedents and scientific matters, etc. This chapter of the book covers practically all problems which ordinarily present themselves when the "Argument" of a brief is being written. Mr. Appleman has done remarkably well with the subject. The discussion of these problems and the manner of their solution are ably, carefully, and entertainingly presented.

"Briefs for the Appellants" is the subject of Chapter 11, Part II. Mr. Appleman emphasizes that one's success or lack of success in appeals depends largely upon the acuteness of his sense of discrimination in selecting the issue or issues to be presented. He makes the observation that one should not fire a barrage in the hope that one pellet may find its mark; instead, he should select with great care the battleground upon which his campaign will be fought. In illustrating his discussion of "Briefs for the Appellants" Mr. Appleman uses copies of briefs from three cases in which he appeared as the attorney for the appellant. One case involved purely legal questions, while another had to do with factual matters. The third was selected because of the proper form of the briefs used. The briefs, of which the illustrations are copies, were filed in the United States Supreme Court, The United States Court of Appeals for the Seventh Circuit, the Supreme Court of Illinois, and The Appellate Court of Illinois for the Third District. The illustrations used are exemplary. The briefs are well prepared, expertly drawn, and furnished an excellent guide for the proper preparation of briefs for appellants.

In Chapter 12, Part II, Mr. Appleman has under consideration the problems which arise in the preparation of "The Appellee's Brief." The manner in which reply should be made to the statement of facts in appellant's brief and the development of new matters of evidence is ably and effectively treated, as are the other features of an appellee's brief. As in the chapter regarding briefs for the appellant Mr. Appleman uses examples to illustrate the form and style commonly used in briefs for the appellee. These examples are taken from cases in which he has appeared as attorney for appellee.

Mr. Appleman concludes his book with the treatment of "The Oral Argument" (Chapter 13, Part III). More than sixty pages are used to explain and illustrate the most effective manner in which an oral argument can be made. The material presented is divided into fifteen separate subjects, wherein are discussed such matters as when to argue orally; who should argue the case; readying the case for argument; and the manner of presentation. One has but to read Mr. Appleman's discourse on an oral argument in order to fully appreciate his long experience in such matters.

I have found in my research few reference books on the technique of appeals. As the usual thing an attorney is required to rely on his initia-

tive in preparing and presenting an appeal. For appeals to the Mississippi Supreme Court we have that very fine article by Honorable W. G. Roberds, Associate Justice of the Mississippi Supreme Court and former Professor of Law at the University of Mississippi, appearing in Volume XVII, Number 3, October 1945, *Mississippi Law Journal,* "Some Suggestions as to Oral Arguments and Written Briefs in the Supreme Court of Mississippi." I have always regarded this article as the primary authority in appellate procedure in Mississippi. In reading Mr. Appleman's work I was amazed at the similarity of the two. The members of the court strive to render justice and to decide cases submitted to them according to law. To assist in the attainment of this goal the practitioner should feel it his duty to present an appeal in clear, positive, and dignified manner. Mr. Appleman's book will help any lawyer do this. He has covered the subject from the first to the last step. He has done so in a work that is easy to read, entertaining, understandable, and couched in language that is clear and plain. I commend this book to any lawyer who desires to improve his appellate technique. I unhesitatingly state that no lawyer, young or old, experienced or inexperienced, can read Mr. Appleman's book without being benefited thereby. It is a reference book that will pay large dividends in your law library.

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THE ENCYCLOPEDIA OF TAX PROCEDURES. Edited by J. K. Lasser. Englewood Cliffs, New Jersey: Prentice-Hall Inc. 1956. Pp. 1792. $28.00.

The search continues for a practical work to cover the many complex tax problems arising from the Internal Revenue Code. To solve these problems J. K. Lasser called upon 101 tax authorities throughout the nation. These authorities wrote upon nine topics in ninety-five chapters. Lasser has not provided the solution in *The Encyclopedia of Tax Procedures.* The search for practical tax work must continue.

Lasser's sudden death prevented him from completing *The Encyclopedia of Tax Procedures.* Sydney Prerau, Director of the J. K. Lasser Tax Institute, completed the work.

To those persons who are familiar with and have used the simple "how to" books previously edited by Lasser, *The Encyclopedia of Tax Procedures,* will be a very different and highly complex work.

Very little aid or assistance can be obtained from this work by the lawyer completing and filing the income tax returns of the average taxpayer. But the lawyer with a complex or unusual tax problem may obtain helpful suggestions from *The Encyclopedia of Tax Procedures* and it is within this group that the work will enjoy its greatest popularity.

Part I discusses the "Planning An Organization and Operation" of a business. Chapter 3 of Part I, "How to Operate Partnerships", is especially well written.

Part II of the work concerns itself with "Reorganizing the Business".

"Business Accounting" is the topic of Part III. All who do not have

some accounting background or experience will find Part III most difficult reading. Chapter 20 of Part III, "Farmer's Accounting", however, is very well done.

Part IV, "Business Expenses and Losses" is closely aligned to Accounting Procedures set forth in Part III. One of the better written chapters in *The Encyclopedia of Tax Procedures* is Chapter 35 of Part IV written by David Susser on "The Net Operating Loss Deduction". A most difficult provision of the Internal Revenue Code is treated by Mr. Susser simply yet completely with the material being especially well organized.

"Business Management Problems" occupies Part V. Chapters in this section deal with the complex problems of intercompany transactions. Both Parts V and VI concern themselves almost exclusively with the problems of corporations—Part VI being entitled, "Dividends and Other Relations with Stockholders". In the latter part, Chapter 50 setting forth the treatment of "Stock Dividends" is especially significant.

Parts VII and VIII give a very comprehensive review of the tax problems involved in the sales and exchanges of property. Chapter 78 of Part VIII is noteworthy in its treatment of "Federal Income Tax On Assignment of Interests in Gas and Oil". The reader of this chapter will find a most concise treatment of the tax problems arising from oil and gas investments.

A circumstance which frequently confronts the tax lawyer is that of the purchase and sale of residences by the taxpayer. Chapter 77 of Part VIII handles the problem very well and several examples contained therein add to the simplification of the treatment of this subject.

Lastly, Part IX completes the work, having as its title "Individual Transactions". Within this section problems from "How to Make Financial Arrangements Before a Marriage" to "Citizens Living Abroad" are discussed.

All chapters contain full reference to the Internal Revenue Code of 1954 and are well footnoted with reference material.

The Encyclopedia of Tax Procedures is truly a complete work but it does have some shortcomings. Many of its chapters are written in such a complex style as to make it difficult reading for most lawyers. As stated before, the book will be of great benefit to the attorney dealing with the more difficult tax problems but the attorney whose practice is confined to the simple tax return of the average taxpayer will find it expensive and of little use. The book, though voluminous, is well indexed and subject matter can be found with ease.

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VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION. By Thomas Reed Powell. New York: Columbia University Press, 1956. Pp. 229. $3.50

This is a wise and witty group of six essays on the evolution and involution of several of the most significant constitutional doctrines. They originated as a series of lectures in 1955 at the Columbia University School of Law. Powell served as a professor of constitutional law at Columbia until 1925, and from that date until his retirement in 1949 he was professor of law at Harvard University. He died a few months after these lectures were delivered, so two of his former colleagues, Earnest J. Brown and Paul A. Freund, edited the manuscript for publication.

The specific topics include the establishment and development of judicial review, the expansion of national power, state power to regulate and to tax in the light of the protection of interstate commerce, state police power and constitutional federalism, and intergovernmental immunities. These essays are interesting and valuable in two frames of reference. They are highly expert treatments of these branches of constitutional law, which arise often in legal practice. This is particularly true of the problems of state regulatory and taxing power affecting interstate commerce. The author had an encyclopedic knowledge of the work of the United States Supreme Court in these fields. These essays represent the aggregate of a lifetime of study and thought about them. Powell's analysis of the cases is always clear, although often debatable. His exposition of the cases should be helpful to practitioners, judges and law students.

On another level, these lectures develop a philosophic insight into the reasons given in written judicial opinions, and into judicial processes in operation. Learned Hand once commented on the remarkably impersonal quality of Cardozo's justice. He said that Cardozo could "weigh the conflicting factors of his problems without always finding himself in one scale or the other." Few have been able to reach this high standard of judicial responsibility. In these essays Powell brings to the work of the Supreme Court of the United States a reflective curiosity, a broad knowledge of its work, and a sympathetic understanding of its problems.

Unfortunately Mr. Powell does not discuss the antinomies of federalism in the light of the segregation cases. Toward the close he recognizes that this is a serious area of constitutional law for which his lectures did not permit time. In the light of developments since 1954, it appears that he is in error in an attempt to simply dispose of this question by stating that the decisions would "obviously support" his thesis. I regret that a man of his scholarship and practicality did not give us the benefit of his mature analysis of the due process clause in the light of *Plessy v. Ferguson* and *Brown v. Board of Education.*

Nevertheless, the field covered by this book is analyzed perceptively, comprehensively and with a warm sense of humor. It is said that Prof. Powell once stated that he could easily prepare "A Restatement of Constitutional Law." In the usual form, the black letter text would read: "Congress may regulate interstate commerce." A comment would add: "The states may also regulate interstate commerce, but not too much." And then there would follow a caveat: "How much is too much is beyond the scope of this Restatement."

Yet these lectures do not straddle the fence. Powell states clearly his own opinions and conclusions. Particularly interesting in the light of recent developments is his analysis of the questions dealing with whether states have concurrent powers with Congress or no power, where there is interstate commerce. He apparently thinks that the states' powers of taxation and of police have been unduly circumscribed by the United States Supreme Court, and that the Court has not given adequate recognition to the reciprocal relations between state and nation. Judges should be practicing pragmatists, adapting principles in federal constitutional law to the practical needs of the particular case, and in the tax field, infusing common sense to tip the balance by placing decisions primarily upon an economic judgment of where the state tax falls. Like Holmes, he thinks that the choice between the uniformity and diversity tests concerning state regulation of interstate commerce is distinctly a congressional problem, and the states enjoy a concurrent power in the field of commerce regulation, except when there are barriers to its exercise.

We can all agree with Mr. Powell that, "A repeatedly distinguished case is a case that is no longer distinguished." and he concludes: "Fortunately, even in tracing the titles of real estate, there is not infrequently needed the saving grace of prescription. Prescription may need to be invoked in making acceptable the course of constitutional history and of constitutional law." Yet Powell was gifted with one of the finest legal minds of this century, and his vast knowledge and understanding of constitutional law is exemplified in this little book. He does not rely upon the doctrine of prescription, but upon comprehensive scholarship and a warmly humorous and understanding approach to constitutional law, which is a political science as well as a field of law. All of us who work in this field, either as judges or practicing lawyers or students, have a broader and more understanding approach to these problems because of the superb contributions of Thomas Reed Powell.

W. N. Ethridge, Jr.
Associate Justice
Supreme Court of Mississippi

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